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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN MATEO

MARTIN EBERHARD,

Plaintiff,

vs.

ELON MUSK; TESLA MOTORS, INC.; and DOES 1-20, inclusive,

Defendants.

Civil Case No. CIV-484400

APPENDIX OF NON-CALIFORNIA AUTHORITIES REFERENCED IN THE MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF MARTIN EBERHARD'S OPPOSITION TO DEFENDANTS' SPECIAL MOTION TO STRIKE PORTIONS OF PLAINTIFF'S COMPLAINT AS A STRATEGIC LAWSUIT AGAINST PUBLIC PARTICIPATION

Date: July 29, 2009
Time: 9:00 a.m.
Dep.: 11
Judge: Hon. John L. Grandsaert

Pursuant to Rule 3.1113(i) of the California Rules of Court, attached hereto are true and correct copies of the Non-California authorities referenced in the Memorandum of Points and Authorities in Support of Plaintiff Martin Eberhard's Opposition to Defendants' Special Motion to Strike Portions of Plaintiff's Complaint as a Strategic Lawsuit against Public Participation:

CASE NAME/AUTHORITIY	EXHIBITS
Gertz v. Robert Welch, Inc. (1974) 418 U.S. 323	A.
Milkovich v. Lorain Journal Co. (1990) 497 U.S. 1	B.
SDV/ACCI, Inc. v. AT&T Corp. (9th Cir. 2008) 522 F.3d 955	C.
St. Amant v. Thompson (1968) 390 U.S. 727	D.
Time, Inc. v. Firestone (1976) 424 U.S. 448	E.

Date: July 16, 2009

PERETZ & ASSOCIATES

By:_____
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Yosef Peretz
Genevieve Guertin
Attorneys for Plaintiff
MARTIN EBERHARD

EXHIBIT A

EXHIBIT A

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Questioned
As of: Jul 16, 2009

GERTZ v. ROBERT WELCH, INC.

No. 72-617

SUPREME COURT OF THE UNITED STATES

418 U.S. 323*; *94 S. Ct. 2997*; *41 L. Ed. 2d 789*; *1974 U.S. LEXIS 88*; *1 Media L. Rep. 1633

November 14, 1973, Argued
June 25, 1974, Decided

PRIOR HISTORY: CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

DISPOSITION: *471 F.2d 801*, reversed and remanded.

SYLLABUS

A Chicago policeman named Nuccio was convicted of murder. The victim's family retained petitioner, a reputable attorney, to represent them in civil litigation against Nuccio. An article appearing in respondent's magazine alleged that Nuccio's murder trial was part of a Communist conspiracy to discredit the local police, and it falsely stated that petitioner had arranged Nuccio's "frame-up," implied that petitioner had a criminal record, and labeled him a "Communist-fronter." Petitioner brought this diversity libel action against respondent. After the jury returned a verdict for petitioner, the District Court decided that the standard enunciated in *New York Times Co. v. Sullivan, 376 U.S. 254*, which bars media liability for defamation of a public official absent proof that the defamatory statements were published with knowledge of their falsity or in reckless disregard of the truth, should apply to this suit. The court concluded that that standard protects media discussion of a public issue without regard to whether the person defamed is a public official as in *New York Times Co. v. Sullivan, supra*, or a public figure, as in *Curtis Publishing Co. v. Butts, 388 U.S. 130*. The court found that petitioner had failed to prove knowledge of falsity or reckless disregard for the truth and therefore entered judgment *n. o. v.* for respondent. The Court of Appeals affirmed. *Held*:

1. A publisher or broadcaster of defamatory falsehoods about an individual who is neither a public official nor a public figure may not claim the *New York Times* protection against liability for defamation on the ground that the defamatory statements concern an issue of public or general interest. Pp. 339-348.

(a) Because private individuals characteristically have less effective opportunities for rebuttal than do public officials and public figures, they are more vulnerable to injury from defamation. Because they have not voluntarily exposed themselves to increased risk of injury from defamatory falsehoods, they are also more deserving of recovery. The state interest in compensating injury to the reputation of private individuals is therefore greater than for public officials and public figures. Pp.

343-345.

(b) To extend the *New York Times* standard to media defamation of private persons whenever an issue of general or public interest is involved would abridge to an unacceptable degree the legitimate state interest in compensating private individuals for injury to reputation and would occasion the additional difficulty of forcing courts to decide on an *ad hoc* basis which publications and broadcasts address issues of general or public interest and which do not. Pp. 345-346.

(c) So long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood which injures a private individual and whose substance makes substantial danger to reputation apparent. Pp. 347-348.

2. The States, however, may not permit recovery of presumed or punitive damages when liability is not based on knowledge of falsity or reckless disregard for the truth, and the private defamation plaintiff who establishes liability under a less demanding standard than the *New York Times* test may recover compensation only for actual injury. Pp. 348-350.

3. Petitioner was neither a public official nor a public figure. Pp. 351-352.

(a) Neither petitioner's past service on certain city committees nor his appearance as an attorney at the coroner's inquest into the death of the murder victim made him a public official. P. 351.

(b) Petitioner was also not a public figure. Absent clear evidence of general fame or notoriety in the community and pervasive involvement in ordering the affairs of society, an individual should not be deemed a public figure for all aspects of his life. Rather, the public-figure question should be determined by reference to the individual's participation in the particular controversy giving rise to the defamation. Petitioner's role in the Nuccio affair did not make him a public figure. Pp. 351-352.

COUNSEL: Wayne B. Giampietro argued the cause and filed briefs for petitioner.

Clyde J. Watts argued the cause and filed a brief for respondent.

JUDGES: POWELL, J., delivered the opinion of the Court, in which STEWART, MARSHALL, BLACKMUN, and REHNQUIST, JJ., joined. BLACKMUN, J., filed a concurring opinion, post, p. 353. BURGER, C. J., post, p. 354, DOUGLAS, J., post, p. 355, BRENNAN, J., post, p. 361, and WHITE, J., post, p. 369, filed dissenting opinions.

OPINION BY: POWELL

OPINION

[*325] [***797] [**3000] MR. JUSTICE POWELL delivered the opinion of the Court.

[***LEdHR1] [1]This Court has struggled for nearly a decade to define the proper accommodation between the law of defamation and the freedoms of speech and press protected by the *First Amendment*. With this decision we return to that effort. We granted certiorari to reconsider the extent of a publisher's constitutional privilege against liability for defamation of a private citizen. *410 U.S. 925 (1973)*.

I

In 1968 a Chicago policeman named Nuccio shot and killed a youth named Nelson. The state authorities prosecuted Nuccio for the homicide and ultimately obtained a conviction for murder in the second degree. The Nelson family retained petitioner Elmer Gertz, a reputable attorney, to represent them in civil litigation against Nuccio.

Respondent publishes American Opinion, a monthly outlet for the views of the John Birch Society. Early in the 1960's the magazine began to warn of a nationwide conspiracy to discredit local law enforcement agencies and create in their stead a national police force capable of supporting a Communist dictatorship. As part of the continuing effort to alert the public to this assumed danger, the managing editor of American Opinion commissioned an article on the murder trial of Officer Nuccio. For this purpose he engaged a regular contributor to the magazine. In March 1969 respondent published the resulting article under the title "FRAME-UP: Richard [*326] Nuccio And The War On Police." The article purports to demonstrate that the testimony against Nuccio at his criminal trial was false and that his prosecution was part of the Communist campaign against the police.

In his capacity as counsel for the Nelson family in the civil litigation, petitioner attended the coroner's inquest into the boy's death and initiated actions for damages, but the neither discussed Officer Nuccio with the press nor played any part in the criminal proceeding. Notwithstanding petitioner's remote connection with the prosecution of Nuccio, respondent's magazine portrayed him as an architect of the "frame-up." According to the article, the police file on petitioner took "a big, Irish cop to lift." The article stated that petitioner had been an official of the "Marxist League for Industrial Democracy, originally known as the Intercollegiate Socialist Society, which has advocated the violent seizure of our government." It labeled Gertz a "Leninist" and a "Communist-fronter." It also stated that Gertz had been an officer of the National Lawyers Guild, described as a Communist organization that "probably did more than any other outfit to plan the Communist attack on the Chicago police during the 1968 Democratic Convention."

These statements contained serious inaccuracies. The implication that petitioner had a criminal record was false. Petitioner had been a member and officer of the National Lawyers Guild some 15 years earlier, but there was no evidence that he or that organization had taken any part in planning the 1968 demonstrations in Chicago. There was also no basis for the charge that [***798] petitioner was a "Leninist" or a "Communist-fronter." And he had never been a member of the "Marxist League for Industrial Democracy" or the "Intercollegiate Socialist Society. "

[*327] The managing editor of American Opinion made no effort to verify or substantiate the charges against petitioner. Instead, he appended an editorial introduction [**3001] stating that the author had "conducted extensive research into the Richard Nuccio Case." And he included in the article a photograph of petitioner and wrote the caption that appeared under it: "Elmer Gertz of Red Guild harrasses Nuccio." Respondent placed the issue of American Opinion containing the article on sale at newsstands throughout the country and distributed reprints of the article on the streets of Chicago.

Petitioner filed a diversity action for libel in the United States District Court for the Northern District of Illinois. He claimed that the falsehoods published by respondent injured his reputation as a lawyer and a citizen. Before filing an answer, respondent moved to dismiss the complaint for failure to state a claim upon which relief could be granted, apparently on the ground that petitioner failed to allege special damages. But the court ruled that statements contained in the article constituted libel *per se* under Illinois law and that consequently petitioner need not plead special damages. *306 F.Supp. 310 (1969).*

After answering the complaint, respondent filed a pretrial motion for summary judgment, claiming a constitutional privilege against liability for defamation. [1] It asserted that petitioner was a public official or a public figure and that the article concerned an issue of public interest and concern. For these reasons, respondent argued, it was entitled to invoke the privilege enunciated in *New York Times Co. v. Sullivan, 376 U.S. 254 (1964).* Under this rule respondent would escape liability unless [*328] petitioner could prove publication of defamatory falsehood "with 'actual malice' -- that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id., at 280.* Respondent claimed that petitioner could not make such a showing and submitted a supporting affidavit by the magazine's managing editor. The editor denied any knowledge of the falsity of the statements concerning petitioner and stated that he had relied on the author's reputation and on his prior experience with the accuracy and authenticity of the author's contributions to American Opinion.

1 Petitioner filed a cross-motion for summary judgment on grounds not specified in the record. The court denied petitioner's cross-motion without discussion in a memorandum opinion of September 16, 1970.

The District Court denied respondent's motion for summary judgment in a memorandum opinion of September 16, 1970. The court did not dispute respondent's claim to the protection of the *New York Times* standard. Rather, it concluded that petitioner might overcome the constitutional privilege by making a factual showing sufficient to prove publication of defamatory falsehood in reckless disregard of the truth. During the course of the trial, however, it became clear that the trial court had not accepted all of respondent's asserted grounds for applying the *New York Times* [***799] rule to this case. It thought that respondent's claim to the protection of the constitutional privilege depended on the contention that petitioner was either a public official under the *New York Times* decision or a

public figure under *Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967)*, apparently discounting the argument that a privilege would arise from the presence of a public issue. After all the evidence had been presented but before submission of the case to the jury, the court ruled in effect that petitioner was neither a public official nor a public figure. It added that, if he were, the resulting application of the *New York Times* standard would require a directed verdict for respondent. Because some statements in the article constituted libel *per se* [*329] under Illinois law, the court submitted the case to the jury under instructions that withdrew from its consideration all issues save the measure of damages. The jury awarded $ 50,000 to petitioner.

[**3002] [***LEdHR2] [2]Following the jury verdict and on further reflection, the District Court concluded that the *New York Times* standard should govern this case even though petitioner was not a public official or public figure. It accepted respondent's contention that that privilege protected discussion of any public issue without regard to the status of a person defamed therein. Accordingly, the court entered judgment for respondent notwithstanding the jury's verdict. [2] This conclusion anticipated the reasoning [*330] of a plurality of this Court in *Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971).*

2 *322 F.Supp. 997 (1970).* Petitioner asserts that the entry of judgment *n. o. v.* on the basis of his failure to show knowledge of falsity or reckless disregard for the truth constituted unfair surprise and deprived him of a full and fair opportunity to prove "actual malice" on the part of respondent. This contention is not supported by the record. It is clear that the trial court gave petitioner no reason to assume that the *New York Times* privilege would not be available to respondent. The court's memorandum opinion denying respondent's pretrial motion for summary judgment does not state that the *New York Times* standard was inapplicable to this case. Rather, it reveals that the trial judge thought it possible for petitioner to make a factual showing sufficient to overcome respondent's claim of constitutional privilege. It states in part:

"When there is a factual dispute as to the existence of actual malice, summary judgment is improper.

. . . .

"In the instant case a jury might infer from the evidence that [respondent's] failure to investigate the truth of the allegations, coupled with its receipt of communications challenging the factual accuracy of this author in the past, amounted to actual malice, that is, 'reckless disregard' of whether the allegations were true or not. *New York Times [Co.]* v. *Sullivan, [376 U.S. 254,] 279-280 [(1964)].*" Mem. Op., Sept. 16, 1970.

Thus, petitioner knew or should have known that the outcome of the trial might hinge on his ability to show by clear and convincing evidence that respondent acted with reckless disregard for the truth. And this question remained open throughout the trial. Although the court initially concluded that the applicability of the *New York Times* rule depended on petitioner's status as a public figure, the court did not decide that petitioner was not a public figure until all the evidence had been presented. Thus petitioner had every opportunity, indeed incentive, to prove "reckless disregard" if he could, and he in fact attempted to do so. The record supports the observation by the Court of Appeals that petitioner "did present evidence of malice (both the 'constitutional' and the 'ill will' type) to support his damage claim and no such evidence was excluded . . . ." *471 F.2d 801, 807 n. 15 (1972).*

[***LEdHR3] [3] [***LEdHR4] [4]Petitioner appealed to contest the applicability of the *New* [***800] *York Times* standard to this case. Although the Court of Appeals for the Seventh Circuit doubted the correctness of the District Court's determination that petitioner was not a public figure, it did not overturn that finding. [3] It agreed with the District Court that respondent could assert the constitutional privilege because the article concerned a matter of public interest, citing this Court's intervening decision in *Rosenbloom v. Metromedia, Inc., supra.* The Court of Appeals read *Rosenbloom* to require application of the *New York Times* standard to any publication or broadcast about an issue of significant public interest, without regard to the position, fame, or anonymity of the person defamed, and it concluded that respondent's statements [*331] concerned such an issue.

[4] After reviewing the record, the Court of Appeals endorsed [**3003] the District Court's conclusion that petitioner had failed to show by clear and [*332] convincing evidence that respondent had acted with "actual malice" as defined by *New York Times*. There was no evidence that [***801] the managing editor of American Opinion knew of the falsity of the accusations made in the article. In fact, he knew nothing about petitioner except what he learned from the article. The court correctly noted that mere proof of failure to investigate, without more, cannot establish reckless disregard for the truth. Rather, the publisher must act with a "'high degree of awareness of . . . probable falsity.'" *St. Amant v. Thompson, 390 U.S. 727, 731 (1968)*; accord, *Beckley Newspapers Corp. v. Hanks, 389 U.S. 81, 84-85 (1967)*; *Garrison v. Louisiana, 379 U.S. 64, 75-76 (1964)*. The evidence in this case did not reveal that respondent had cause for such an awareness. The Court of Appeals therefore affirmed, *471 F.2d 801 (1972)*. For the reasons stated below, we reverse.

3 The court stated:

"[Petitioner's] considerable stature as a lawyer, author, lecturer, and participant in matters of public import [undermines] the validity of the assumption that he is not a 'public figure' as that term has been used by the progeny of *New York Times*. Nevertheless, for purposes of decision we make that assumption and test the availability of the claim of privilege by the subject matter of the article." *Id., at 805*.

4 In the Court of Appeals petitioner made an ingenious but unavailing attempt to show that respondent's defamatory charge against him concerned no issue of public or general interest. He asserted that the subject matter of the article was the murder trial of Officer Nuccio and that he did not participate in that proceeding. Therefore, he argued, even if the subject matter of the article generally were protected by the *New York Times* privilege, under the opinion of the *Rosenbloom* plurality, the defamatory statements about him were not. The Court of Appeals rejected this argument. It noted that the accusations against petitioner played an integral part in respondent's general thesis of a nationwide conspiracy to harass the police:

"[We] may also assume that the article's basic thesis is false. Nevertheless, under the reasoning of *New York Times Co.* v. *Sullivan*, even a false statement of fact made in support of a false thesis is protected unless made with knowledge of its falsity or with reckless disregard of its truth o falsity. It would undermine the rule of that case to permit the actual falsity of a statement to determine whether or not its publisher is entitled to the benefit of the rule.

"If, therefore, we put to one side the false character of the article and treat it as though its contents were entirely true, it cannot be denied that the comments about [petitioner] were integral to its central thesis. They must be tested under the *New York Times* standard." *471 F.2d, at 806*.

We think that the Court of Appeals correctly rejected petitioner's argument. Its acceptance might lead to arbitrary imposition of liability on the basis of an unwise differentiation among kinds of factual misstatements. The present case illustrates the point. Respondent falsely portrayed petitioner as an architect of the criminal prosecution against Nuccio. On its face this inaccuracy does not appear defamatory. Respondent also falsely labeled petitioner a "Leninist" and a "Communist-fronter." These accusations are generally considered defamatory. Under petitioner's interpretation of the "public or general interest" test, respondent would have enjoyed a constitutional privilege to publish defamatory falsehood if petitioner had in fact been associated with the criminal prosecution. But this would mean that the seemingly innocuous mistake of confusing petitioner's role in the litigation against Officer Nuccio would destroy the privilege otherwise available for calling petitioner a Communist-fronter. Thus respondent's privilege to publish statements whose content should have alerted it to the danger of injury to reputation would hinge on the accuracy of statements that carried with them no such warning. Assuming that none of these statements was published with knowledge of falsity or with reckless disregard for the truth, we see no reason to distinguish among the inaccuracies.

II

[***LEdHR5A] [5A]The principal issue in this case is whether a newspaper or broadcaster that publishes defamatory falsehoods about an individual who is neither a public official nor a public figure may claim a constitutional privilege against liability for the injury inflicted by those statements. The Court considered this question on the rather different set of facts presented in *Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971)*. Rosenbloom, a distributor of nudist magazines, was arrested for selling allegedly obscene material while making [*333] a delivery to a retail dealer. The police obtained a warrant and seized his entire inventory of 3,000 books and magazines. He sought and obtained an injunction prohibiting further police interference with his business. He then sued a local radio station for failing to note in two of its newscasts that the 3,000 items seized were only "reportedly" or "allegedly" obscene and [**3004] for broadcasting references to "the smut literature racket" and to "girlie-book peddlers" in its coverage of the court proceeding for injunctive relief. He obtained a judgment against the radio station, but the Court of Appeals for the Third Circuit held the *New York Times* privilege applicable to the broadcast and reversed. *415 F.2d 892 (1969)*.

This Court affirmed the decision below, but no majority could agree on a controlling rationale. The eight Justices [5] who participated in *Rosenbloom* announced their views in five separate opinions, none of which commanded more than three votes. The several statements not only reveal disagreement about the appropriate result in that case, they also reflect divergent traditions of thought about the general problem of reconciling the law of defamation with the *First Amendment*. One approach has been to extend the *New York Times* test to an expanding variety of situations. Another has been to vary the level of constitutional privilege for defamatory falsehood with the status of the person defamed. And a third view would grant to the press and broadcast media absolute immunity from liability for defamation. To place our holding in the proper context, we preface our discussion of this case with a review of the several *Rosenbloom* opinions and their antecedents.

5 MR. JUSTICE DOUGLAS did not participate in the consideration or decision of *Rosenbloom*.

In [***802] affirming the trial court's judgment in the instant case, the Court of Appeals relied on MR. JUSTICE BRENNAN's [*334] conclusion for the *Rosenbloom* plurality that "all discussion and communication involving matters of public or general concern," *403 U.S., at 44*, warrant the protection from liability for defamation accorded by the rule originally enunciated in *New York Times Co. v. Sullivan, 376 U.S. 254 (1964)*. There this Court defined a constitutional privilege intended to free criticism of public officials from the restraints imposed by the common law of defamation. The Times ran a political advertisement endorsing civil rights demonstrations by black students in Alabama and impliedly condemning the performance of local law-enforcement officials. A police commissioner established in state court that certain misstatements in the advertisement referred to him and that they constituted libel *per se* under Alabama law. This showing left the Times with the single defense of truth, for under Alabama law neither good faith nor reasonable care would protect the newspaper from liability. This Court concluded that a "rule compelling the critic of official conduct to guarantee the truth of all his factual assertions" would deter protected speech, *id., at 279*, and announced the constitutional privilege designed to counter that effect:

"The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' -- that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id., at 279-280*. [6]

6 *New York Times* and later cases explicated the meaning of the new standard. In *New York Times* the Court held that under the circumstances the newspaper's failure to check the accuracy of the advertisement against news stories in its own files did not establish reckless disregard for the truth. *376 U.S., at 287-288*. In *St. Amant v. Thompson, 390 U.S. 727, 731 (1968)*, the Court equated reckless disregard of the truth with subjective awareness of probable falsity: "There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." In *Beckley Newspapers Corp. v. Hanks, 389 U.S. 81 (1967)*, the Court emphasized the distinction between the *New York Times* test of knowledge of falsity or reckless disregard of the truth and "actual malice" in the traditional sense of ill-will. *Garrison v.*

Louisiana, 379 U.S. 64 (1964), made plain that the new standard applied to criminal libel laws as well as to civil actions and that it governed criticism directed at "anything which might touch on an official's fitness for office." *Id., at 77.* Finally, in *Rosenblatt v. Baer, 383 U.S. 75, 85 (1966)*, the Court stated that "the 'public official' designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs."

In *Time, Inc. v. Hill, 385 U.S. 374 (1967)*, the Court applied the *New York Times* standard to actions under an unusual state statute. The statute did not create a cause of action for libel. Rather, it provided a remedy for unwanted publicity. Although the law allowed recovery of damages for harm caused by exposure to public attention rather than by factual inaccuracies, it recognized truth as a complete defense. Thus, nondefamatory factual errors could render a publisher liable for something akin to invasion of privacy. The Court ruled that the defendant in such an action could invoke the *New York Times* privilege regardless of the fame or anonymity of the plaintiff. Speaking for the Court, MR. JUSTICE BRENNAN declared that this holding was not an extension of *New York Times* but rather a parallel line of reasoning applying that standard to this discrete context:

"This is neither a libel action by a private individual nor a statutory action by a public official. Therefore, although the *First Amendment* principles pronounced in *New York Times* guide our conclusion, we reach that conclusion only by applying these principles in this discrete context. It therefore serves no purpose to distinguish the facts here from those in *New York Times*. Were this a libel action, the distinction which has been suggested between the relative opportunities of the public official and the private individual to rebut defamatory charges might be germane. And the additional state interest in the protection of the individual against damage to his reputation would be involved. Cf. *Rosenblatt v. Baer, 383 U.S. 75, 91* (STEWART, J., concurring)." *385 U.S., at 390-391.*

[*335] [**3005] Three [***803] years after *New York Times*, a majority of the Court agreed to extend the constitutional privilege to defamatory criticism of "public figures." This extension [*336] was announced in *Curtis Publishing Co.* v. *Butts* and its companion, *Associated Press v. Walker, 388 U.S. 130, 162 (1967)*. The first case involved the Saturday Evening Post's charge that Coach Wally Butts of the University of Georgia had conspired with Coach "Bear" Bryant of the University of Alabama to fix a football game between their respective schools. *Walker* involved an erroneous Associated Press account of former Major General Edwin Walker's participation in a University of Mississippi campus riot. Because Butts was paid by a private alumni association and Walker had resigned from the Army, neither could be classified as a "public official" under *New York Times*. Although Mr. Justice Harlan announced the result in both cases, a majority of the Court agreed with Mr. Chief Justice Warren's conclusion that the *New York Times* test should apply to criticism of "public figures" as well as "public officials." [7] The Court extended the constitutional [*337] privilege announced in that case to protect defamatory criticism of nonpublic persons who "are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large." *Id., at 164* (Warren, C. J., concurring in result).

7 Professor Kalven once introduced a discussion of these cases with the apt heading, "You Can't Tell the Players without a Score Card." Kalven, The Reasonable Man and the *First Amendment*: Hill, Butts, and Walker, 1967 Sup. Ct. Rev. 267, 275. Only three other Justices joined Mr. Justice Harlan's analysis of the issues involved. In his concurring opinion, Mr. Chief Justice Warren stated the principle for which these cases stand -- that the *New York Times* test reaches both public figures and public officials. MR. JUSTICE BRENNAN and MR. JUSTICE WHITE agreed with the Chief Justice on that question. Mr. Justice Black and MR. JUSTICE DOUGLAS reiterated their view that publishers should have an absolute immunity from liability for defamation, but they acquiesced in the Chief Justice's reasoning in order to enable a majority of the Justices to agree on the question of the appropriate constitutional privilege for defamation of public figures.

In his opinion for the plurality in *Rosenbloom v. Metromedia, Inc., 403 U.S. 29* [**3006] *(1971)*, MR. JUSTICE BRENNAN took the *New York Times* privilege one step further. He concluded that its protection should extend to defamatory falsehoods relating to private persons if the statements [***804] concerned matters of general or public interest. He abjured the suggested distinction between public officials and public figures on the one hand and private individuals on the other. He focused instead on society's interest in learning about certain issues: "If a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not 'voluntarily' choose to become involved." *Id., at 43.* Thus, under the plurality opinion, a private citizen involuntarily associated with a matter of general interest has no recourse for injury to his reputation unless he can satisfy the demanding requirements of the *New York Times* test.

Two Members of the Court concurred in the result in *Rosenbloom* but departed from the reasoning of the plurality. Mr. Justice Black restated his view, long shared by MR. JUSTICE DOUGLAS, that the *First Amendment* cloaks the news media with an absolute and indefeasible immunity from liability for defamation. *Id., at 57.* MR. JUSTICE WHITE concurred on a narrower ground. *Ibid.* He concluded that "the *First Amendment* gives the press and the broadcast media a privilege to report and comment upon the official actions of public [*338] servants in full detail, with no requirement that the reputation or the privacy of an individual involved in or affected by the official action be spared from public view." *Id., at 62.* He therefore declined to reach the broader questions addressed by the other Justices.

Mr. Justice Harlan dissented. Although he had joined the opinion of the Court in *New York Times*, in *Curtis Publishing Co.* he had contested the extension of the privilege to public figures. There he had argued that a public figure who held no governmental office should be allowed to recover damages for defamation "on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." *388 U.S., at 155.* In his *Curtis Publishing Co.* opinion Mr. Justice Harlan had distinguished *New York Times* primarily on the ground that defamation actions by public officials "lay close to seditious libel . . . ." *Id., at 153.* Recovery of damages by one who held no public office, however, could not "be viewed as a vindication of governmental policy." *Id., at 154.* Additionally, he had intimated that, because most public officials enjoyed absolute immunity from liability for their own defamatory utterances under *Barr v. Matteo, 360 U.S. 564 (1959)*, they lacked a strong claim to the protection of the courts.

In *Rosenbloom* Mr. Justice Harlan modified these views. He acquiesced in the application of the privilege to defamation of public figures but argued that a different rule should obtain where defamatory falsehood harmed a private individual. He noted that a private person has less likelihood "of securing access to channels of communication sufficient to rebut falsehoods concerning him" than do public officials and public figures, *403 U.S., at 70,* and has not voluntarily placed himself in the [*339] public spotlight. Mr. Justice Harlan concluded that the States could constitutionally allow private individuals to recover damages [***805] for defamation on the basis of any standard of care except liability without fault.

MR. JUSTICE MARSHALL dissented in *Rosenbloom* in an opinion joined by MR. JUSTICE STEWART. *Id.*, at 78. He thought that the plurality's "public or general interest" test for determining the applicability of the *New York Times* privilege would involve the courts in the dangerous business of deciding "what information is relevant to [**3007] self-government." *Id., at 79.* He also contended that the plurality's position inadequately served "society's interest in protecting private individuals from being thrust into the public eye by the distorting light of defamation." *Ibid.* MR. JUSTICE MARSHALL therefore reached the conclusion, also reached by Mr. Justice Harlan, that the States should be "essentially free to continue the evolution of the common law of defamation and to articulate whatever fault standard best suits the State's need," so long as the States did not impose liability without fault. *Id., at 86.* The principal point of disagreement among the three dissenters concerned punitive damages. Whereas Mr. Justice Harlan thought that the States could allow punitive damages in amounts bearing "a reasonable and purposeful relationship to the actual harm done . . . ," *id., at 75*, MR. JUSTICE MARSHALL concluded that the size and unpredictability of jury awards of exemplary damages unnecessarily exacerbated the problems of media self-censorship and that such damages should therefore be forbidden.

III

[***LEdHR6] [6] [***LEdHR7] [7]We begin with the common ground. Under the *First Amendment* there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but [*340] on the competition of other ideas. [8] But there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in "uninhibited, robust, and wide-open" debate on public issues. *New York Times Co. v. Sullivan, 376 U.S., at 270.* They belong to that category of utterances which "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).*

> 8 As Thomas Jefferson made the point in his first Inaugural Address: "If there be any among us who would wish to dissolve this Union or change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it."

[***LEdHR8] [8] Although the erroneous statement of fact is not worthy of constitutional protection, it is nevertheless inevitable in free debate. As James Madison pointed out in the Report on the Virginia Resolutions of 1798: "Some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press." 4 J. Elliot, Debates on the Federal Constitution of 1787, p. 571 (1876). And punishment of error runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press. Our decisions recognize that a rule of strict liability that compels a publisher or broadcaster to guarantee the accuracy of his factual assertions may lead to intolerable [***806] self-censorship. Allowing the media to avoid liability only by proving the truth of all injurious statements does not accord adequate protection to *First Amendment* liberties. As the Court stated in *New York Times Co. v. Sullivan, supra, at 279*: "Allowance of the defense of truth, [*341] with the burden of proving it on the defendant, does not mean that only false speech will be deterred." The *First Amendment* requires that we protect some falsehood in order to protect speech that matters.

The need to avoid self-censorship by the news media is, however, not the only societal value at issue. If it were, this Court would have embraced long ago the view that publishers and broadcasters enjoy an unconditional and indefeasible immunity from liability for defamation. See *New York Times Co. v. Sullivan, supra, at 293* (Black, J., concurring); *Garrison v. Louisiana, 379 U.S., at 80* (DOUGLAS, J., concurring); *Curtis Publishing Co. v. Butts, 388 U.S., at 170* [**3008] (opinion of Black, J.). Such a rule would, indeed, obviate the fear that the prospect of civil liability for injurious falsehood might dissuade a timorous press from the effective exercise of *First Amendment* freedoms. Yet absolute protection for the communications media requires a total sacrifice of the competing value served by the law of defamation.

[***LEdHR9] [9] The legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood. We would not lightly require the State to abandon this purpose, for, as MR. JUSTICE STEWART has reminded us, the individual's right to the protection of his own good name

"reflects no more than our basic concept of the essential dignity and worth of every human being -- a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the *Ninth* and *Tenth Amendments*. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system." *Rosenblatt v. Baer, 383 U.S. 75, 92 (1966)* (concurring opinion).

[*342] [***LEdHR10] [10]Some tension necessarily exists between the need for a vigorous and uninhibited press and the legitimate interest in redressing wrongful injury. As Mr. Justice Harlan stated, "some antithesis between freedom of speech and press and libel actions persists, for libel remains premised on the content of speech and limits the freedom of the publisher to express certain sentiments, at least without guaranteeing legal proof of their substantial accuracy." *Curtis Publishing Co. v. Butts, supra, at 152.* In our continuing effort to define the proper accommodation between these competing concerns, we have been especially anxious to

assure to the freedoms of speech and press that "breathing space" essential to their fruitful exercise. *NAACP v. Button, 371 U.S. 415, 433 (1963)*. To that end this Court has extended a measure of strategic protection to defamatory falsehood.

[***LEdHR11] [11]The *New York Times* standard [***807] defines the level of constitutional protection appropriate to the context of defamation of a public person. Those who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention, are properly classed as public figures and those who hold governmental office may recover for injury to reputation only on clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth. This standard administers an extremely powerful antidote to the inducement to media self-censorship of the common-law rule of strict liability for libel and slander. And it exacts a correspondingly high price from the victims of defamatory falsehood. Plainly many deserving plaintiffs, including some intentionally subjected to injury, will be unable to surmount the barrier of the *New York Times* test. Despite this [*343] substantial abridgment of the state law right to compensation for wrongful hurt to one's reputation, the Court has concluded that the protection of the *New York Times* privilege should be available to publishers and broadcasters of defamatory falsehood concerning public officials and public figures. *New York Times Co. v. Sullivan, supra; Curtis Publishing Co. v. Butts, supra.* We think that these decisions are correct, but we do not find their holdings justified solely by reference to the interest of the press and broadcast media in immunity from liability. Rather, we believe that the *New York Times* rule states an accommodation between this concern and the limited state interest present in the context of libel actions brought by public persons. For the reasons stated below, we conclude that the state interest in [**3009] compensating injury to the reputation of private individuals requires that a different rule should obtain with respect to them.

Theoretically, of course, the balance between the needs of the press and the individual's claim to compensation for wrongful injury might be struck on a case-by-case basis. As Mr. Justice Harlan hypothesized, "it might seem, purely as an abstract matter, that the most utilitarian approach would be to scrutinize carefully every jury verdict in every libel case, in order to ascertain whether the final judgment leaves fully protected whatever *First Amendment* values transcend the legitimate state interest in protecting the particular plaintiff who prevailed." *Rosenbloom v. Metromedia, Inc., 403 U.S., at 63* (footnote omitted). But this approach would lead to unpredictable results and uncertain expectations, and it could render our duty to supervise the lower courts unmanageable. Because an *ad hoc* resolution of the competing interests at stake in each particular case is not feasible, we must lay down broad rules of general [*344] application. Such rules necessarily treat alike various cases involving differences as well as similarities. Thus it is often true that not all of the considerations which justify adoption of a given rule will obtain in each particular case decided under its authority.

[***LEdHR12] [12]With that caveat we have no difficulty in distinguishing among defamation plaintiffs. The first remedy of any victim of defamation is self-help -- using available opportunities to contradict the lie or correct [***808] the error and thereby to minimize its adverse impact on reputation. Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy. [9] Private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater.

> 9 Of course, an opportunity for rebuttal seldom suffices to undo harm of defamatory falsehood. Indeed, the law of defamation is rooted in our experience that the truth rarely catches up with a lie. But the fact that the self-help remedy of rebuttal, standing alone, is inadequate to its task does not mean that it is irrelevant to our inquiry.

More important than the likelihood that private individuals will lack effective opportunities for rebuttal, there is a compelling normative consideration underlying the distinction between public and private defamation plaintiffs. An individual who decides to seek governmental office must accept certain necessary consequences of that involvement in public affairs. He runs the risk of closer public scrutiny than might otherwise be the case. And society's interest in the officers of government is not strictly limited to the formal discharge of official duties. As the Court pointed out in

Garrison v. Louisiana, 379 U.S., at 77, the public's interest extends to "anything [*345] which might touch on an official's fitness for office . . . . Few personal attributes are more germane to fitness for office than dishonesty, malfeasance, or improper motivation, even though these characteristics may also affect the official's private character."

Those classed as public figures stand in a similar position. Hypothetically, it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare. For the most part those who attain this status have assumed roles of special prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment.

[**3010] Even if the foregoing generalities do not obtain in every instance, the communications media are entitled to act on the assumption that public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them. No such assumption is justified with respect to a private individual. He has not accepted public office or assumed an "influential role in ordering society." *Curtis Publishing Co. v. Butts, 388 U.S., at 164* (Warren, C. J., concurring in result). He has relinquished no part of his interest in the protection of his own good name, and consequently he has a more compelling call on the courts for redress of injury inflicted by defamatory falsehood. Thus, private individuals are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery.

[***809] For these reasons we conclude that the States should retain substantial latitude in their efforts to enforce a [*346] legal remedy for defamatory falsehood injurious to the reputation of a private individual. The extension of the *New York Times* test proposed by the *Rosenbloom* plurality would abridge this legitimate state interest to a degree that we find unacceptable. And it would occasion the additional difficulty of forcing state and federal judges to decide on an *ad hoc* basis which publications address issues of "general or public interest" and which do not -- to determine, in the words of MR. JUSTICE MARSHALL, "what information is relevant to self-government." *Rosenbloom v. Metromedia, Inc., 403 U.S., at 79*. We doubt the wisdom of committing this task to the conscience of judges. Nor does the Constitution require us to draw so thin a line between the drastic alternatives of the *New York Times* privilege and the common law of strict liability for defamatory error. The "public or general interest" test for determining the applicability of the *New York Times* standard to private defamation actions inadequately serves both of the competing values at stake. On the one hand, a private individual whose reputation is injured by defamatory falsehood that does concern an issue of public or general interest has no recourse unless he can meet the rigorous requirements of *New York Times*. This is true despite the factors that distinguish the state interest in compensating private individuals from the analogous interest involved in the context of public persons. On the other hand, a publisher or broadcaster of a defamatory error which a court deems unrelated to an issue of public or general interest may be held liable in damages even if it took every reasonable precaution to ensure the accuracy of its assertions. And liability may far exceed compensation for any actual injury to the plaintiff, for the jury may be permitted to presume damages without proof of loss and even to award punitive damages.

[*347] [***LEdHR13] [13]We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual. [10] This approach provides a [***810] [**3011] more equitable [*348] boundary between the competing concerns involved here. It recognizes the strength of the legitimate state interest in compensating private individuals for wrongful injury to reputation, yet shields the press and broadcast media from the rigors of strict liability for defamation. At least this conclusion obtains where, as here, the substance of the defamatory statement "makes substantial danger to reputation apparent." [11] This phrase places in perspective the conclusion we announce today. Our inquiry would involve considerations somewhat different from those discussed above if a State purported to condition civil liability on a factual misstatement whose content did not warn a reasonably prudent editor or broadcaster of its defamatory potential. Cf. *Time, Inc. v. Hill, 385 U.S. 374*

(1967). Such a case is not now before us, and we intimate no view as to its proper resolution.

10 Our caveat against strict liability is the prime target of MR. JUSTICE WHITE's dissent. He would hold that a publisher or broadcaster may be required to prove the truth of a defamatory statement concerning a private individual and, failing such proof, that the publisher or broadcaster may be held liable for defamation even though he took every conceivable precaution to ensure the accuracy of the offending statement prior to its dissemination. *Post*, at 388-392. In MR. JUSTICE WHITE's view, one who publishes a statement that later turns out to be inaccurate can never be "without fault" in any meaningful sense, for "[it] is he who circulated a falsehood *that he was not required to publish." Post*, at 392 (emphasis added).

MR. JUSTICE WHITE characterizes *New York Times Co. v. Sullivan, 376 U.S. 254 (1964)*, as simply a case of seditious libel. *Post*, at 387. But that rationale is certainly inapplicable to *Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967)*, where MR. JUSTICE WHITE joined four other Members of the Court to extend the knowing-or-reckless-falsity standard to media defamation of persons identified as public figures but not connected with the Government. MR. JUSTICE WHITE now suggests that he would abide by that vote, *post*, at 398, but the full thrust of his dissent -- as we read it -- contradicts that suggestion. Finally, in *Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 57 (1971)*, MR. JUSTICE WHITE voted to apply the *New York Times* privilege to media defamation of an individual who was neither a public official nor a public figure. His opinion states that the knowing-or-reckless-falsity standard should apply to media "comment upon the official actions of public servants," *id., at 62*, including defamatory falsehood about a person arrested by the police. If adopted by the Court, this conclusion would significantly extend the *New York Times* privilege.

MR. JUSTICE WHITE asserts that our decision today "trivializes and denigrates the interest in reputation," *Miami Herald Publishing Co.* v. *Tornillo, ante*, at 262 (concurring opinion), that it "[scuttles] the libel laws of the States in . . . wholesale fashion" and renders ordinary citizens "powerless to protect themselves." *Post*, at 370. In light of the progressive extension of the knowing-or-reckless-falsity requirement detailed in the preceding paragraph, one might have viewed today's decision allowing recovery under any standard save strict liability as a more generous accommodation of the state interest in comprehensive reputational injury to private individuals than the law presently affords.

11 *Curtis Publishing Co. v. Butts, supra, at 155.*

IV

[***LEdHR14] [14]Our accommodation of the competing values at stake in defamation suits by private individuals allows the States to impose liability on the publisher or broadcaster of defamatory falsehood on a less demanding showing than that required by *New York Times*. This conclusion is not based on a belief that the considerations which prompted the adoption of the *New York Times* privilege for defamation of public officials and its extension to public figures are wholly inapplicable to the context of private individuals. Rather, we endorse this approach in recognition of the strong and legitimate state interest in compensating private individuals for injury to reputation. [*349] But this countervailing state interest extends no further than compensation for actual injury. For the reasons stated below, we hold that the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth.

[***LEdHR15] [15]The common law of defamation is an oddity of tort law, for it allows recovery of purportedly compensatory damages without evidence of actual loss. Under the traditional rules pertaining to actions for libel, the existence of injury is presumed from the fact of publication. Juries may award substantial sums as compensation for supposed damage [***811] to reputation without any proof that such harm actually occurred. The largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential of any [**3012] system of liability for defamatory falsehood to inhibit the vigorous exercise of *First Amendment* freedoms. Additionally, the doctrine of presumed damages invites juries to punish unpopular opinion rather than to compensate individuals

for injury sustained by the publication of a false fact. More to the point, the States have no substantial interest in securing for plaintiffs such as this petitioner gratuitous awards of money damages far in excess of any actual injury.

[***LEdHR16] [16] [***LEdHR17] [17]We would not, of course, invalidate state law simply because we doubt its wisdom, but here we are attempting to reconcile state law with a competing interest grounded in the constitutional command of the *First Amendment*. It is therefore appropriate to require that state remedies for defamatory falsehood reach no farther than is necessary to protect the legitimate interest involved. It is necessary to restrict defamation plaintiffs who do not prove knowledge of falsity or reckless disregard for the truth to compensation for actual injury. We [*350] need not define "actual injury," as trial courts have wide experience in framing appropriate jury instructions in tort actions. Suffice it to say that actual injury is not limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering. Of course, juries must be limited by appropriate instructions, and all awards must be supported by competent evidence concerning the injury, although there need be no evidence which assigns an actual dollar value to the injury.

[***LEdHR18] [18]We also find no justification for allowing awards of punitive damages against publishers and broadcasters held liable under state-defined standards of liability for defamation. In most jurisdictions jury discretion over the amounts awarded is limited only by the gentle rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused. And they remain free to use their discretion selectively to punish expressions of unpopular views. Like the doctrine of presumed damages, jury discretion to award punitive damages unnecessarily exacerbates the danger of media self-censorship, but, unlike the former rule, punitive damages are wholly irrelevant to the state interest that justifies a negligence standard for private defamation actions. They are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence. In short, the private defamation plaintiff who establishes liability under a less demanding standard than that stated by *New York Times* may recover only such damages as are sufficient to compensate him for actual injury.

[*351] V

[***LEdHR19] [19]Notwithstanding our refusal to extend the *New York Times* privilege to defamation of private individuals, respondent contends that we should affirm the judgment below on the ground that petitioner is [***812] either a public official or a public figure. There is little basis for the former assertion. Several years prior to the present incident, petitioner had served briefly on housing committees appointed by the mayor of Chicago, but at the time of publication he had never held any remunerative governmental position. Respondent admits this but argues that petitioner's appearance at the coroner's inquest rendered him a "de facto public official." Our cases recognize no such concept. Respondent's suggestion would sweep all lawyers under the *New York Times* rule as officers of the court and distort the plain meaning of the "public official" category beyond all recognition. We decline to follow it.

[***LEdHR20] [20]Respondent's characterization of petitioner as a public figure raises a different question. That designation [**3013] may rest on either of two alternative bases. In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions.

[***LEdHR21] [21] [***LEdHR22] [22]Petitioner has long been active in community and professional affairs. He has served as an officer of local civic groups and of various professional organizations, and he has published several books and articles on legal subjects. Although petitioner was consequently well known in some circles, he had achieved no general fame [*352] or notoriety in the community. None of the prospective jurors called at the trial had ever heard of petitioner prior to this litigation, and respondent offered no proof that this response was atypical of the local population. We would not lightly assume that a citizen's participation in community and professional affairs rendered him a public figure for all purposes. Absent clear evidence of general fame or notoriety in the

community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life. It is preferable to reduce the public-figure question to a more meaningful context by looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation.

[***LEdHR23] [23]In this context it is plain that petitioner was not a public figure. He played a minimal role at the coroner's inquest, and his participation related solely to his representation of a private client. He took no part in the criminal prosecution of Officer Nuccio. Moreover, he never discussed either the criminal or civil litigation with the press and was never quoted as having done so. He plainly did not thrust himself into the vortex of this public issue, nor did he engage the public's attention in an attempt to influence its outcome. We are persuaded that the trial court did not err in refusing to characterize petitioner as a public figure for the purpose of this litigation.

[***LEdHR5B] [5B] [***LEdHR24] [24]We therefore conclude that the *New York Times* standard is inapplicable to this case and that the trial court erred in entering judgment for respondent. Because the jury was allowed to impose liability without fault and was permitted [***813] to presume damages without proof of injury, a new trial is necessary. We reverse and remand for further proceedings in accord with this opinion.

It is so ordered.

CONCUR BY: BLACKMUN

CONCUR

[*353] MR. JUSTICE BLACKMUN, concurring.

I joined MR. JUSTICE BRENNAN'S opinion for the plurality in *Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971)*. I did so because I concluded that, given *New York Times Co. v. Sullivan, 376 U.S. 254 (1964)*, and its progeny (noted by the Court, *ante*, at 334-336, n. 6), as well as *Curtis Publishing Co.* v. *Butts and Associated Press v. Walker, 388 U.S. 130 (1967)*, the step taken in *Rosenbloom*, extending the *New York Times* doctrine to an event of public or general interest, was logical and inevitable. A majority of the Court evidently thought otherwise, as is particularly evidenced by MR. JUSTICE WHITE'S separate concurring opinion there and by the respective dissenting opinions of Mr. Justice Harlan and of MR. JUSTICE MARSHALL joined by MR. JUSTICE STEWART.

The Court today refuses to apply *New York Times* to the private individual, as contrasted with the public official and the public figure. It thus withdraws to the factual limits of the *pre-Rosenbloom* cases. It thereby fixes the outer boundary of the *New York Times* doctrine and [**3014] says that beyond that boundary, a State is free to define for itself the appropriate standard of media liability so long as it does not impose liability without fault. As my joinder in *Rosenbloom's* plurality opinion would intimate, I sense some illogic in this.

The Court, however, seeks today to strike a balance between competing values where necessarily uncertain assumptions about human behavior color the result. Although the Court's opinion in the present case departs from the rationale of the *Rosenbloom* plurality, in that the Court now conditions a libel action by a private person upon a showing of negligence, as contrasted with a showing of willful or reckless disregard, I am willing to [*354] join, and do join, the Court's opinion and its judgment for two reasons:

1. By removing the specters of presumed and punitive damages in the absence of *New York Times* malice, the Court eliminates significant and powerful motives for self-censorship that otherwise are present in the traditional libel action. By so doing, the Court leaves what should prove to be sufficient and adequate breathing space for a vigorous press. What the Court has done, I believe, will have little, if any, practical effect on the functioning of responsible journalism.

2. The Court was sadly fractionated in *Rosenbloom*. A result of that kind inevitably leads to uncertainty. I feel that it is of profound importance for the Court to come to rest in the defamation area and to have a clearly defined majority position that eliminates the unsureness engendered by *Rosenbloom's* diversity. If my vote were not needed to create a majority, I would adhere to my prior view. A definitive ruling, however, is paramount. See *Curtis Publishing Co. v. Butts, 388 U.S., at 170* (Black, J., concurring); *Time,* [***814] *Inc. v. Hill, 385 U.S. 374, 398 (1967)* (Black, J., concurring); *United States v. Vuitch, 402 U.S. 62, 97 (1971)* (separate statement).

For these reasons, I join the opinion and the judgment of the Court.

DISSENT BY: BURGER; DOUGLAS; BRENNAN; WHITE

DISSENT

MR. CHIEF JUSTICE BURGER, dissenting.

The doctrines of the law of defamation have had a gradual evolution primarily in the state courts. In *New York Times Co. v. Sullivan, 376 U.S. 254 (1964)*, and its progeny this Court entered this field.

Agreement or disagreement with the law as it has evolved to this time does not alter the fact that it has been orderly development with a consistent basic rationale. In today's opinion the Court abandons the traditional [*355] thread so far as the ordinary private citizen is concerned and introduces the concept that the media will be liable for negligence in publishing defamatory statements with respect to such persons. Although I agree with much of what MR. JUSTICE WHITE states, I do not read the Court's new doctrinal approach in quite the way he does. I am frank to say I do not know the parameters of a "negligence" doctrine as applied to the news media. Conceivably this new doctrine could inhibit some editors, as the dissents of MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN suggest. But I would prefer to allow this area of law to continue to evolve as it has up to now with respect to private citizens rather than embark on a new doctrinal theory which has no jurisprudential ancestry.

The petitioner here was performing a professional representative role as an advocate in the highest tradition of the law, and under that tradition the advocate is not to be invidiously identified with his client. The important public policy which underlies this tradition -- the right to counsel -- would be gravely jeopardized if every lawyer who takes an "unpopular" case, civil or criminal, [**3015] would automatically become fair game for irresponsible reporters and editors who might, for example, describe the lawyer as a "mob mouthpiece" for representing a client with a serious prior criminal record, or as an "ambulance chaser" for representing a claimant in a personal injury action.

I would reverse the judgment of the Court of Appeals and remand for reinstatement of the verdict of the jury and the entry of an appropriate judgment on that verdict.

MR. JUSTICE DOUGLAS, dissenting.

The Court describes this case as a return to the struggle of "[defining] the proper accommodation between the law of defamation and the freedoms of speech and press protected by the *First Amendment*." It is indeed a struggle, once described by Mr. Justice Black as "the same [*356] quagmire" in which the Court "is now helplessly struggling in the field of obscenity." *Curtis Publishing Co. v. Butts, 388 U.S. 130, 171* (concurring opinion). I would suggest that the struggle is a quite hopeless one, for, in light of the command of the *First Amendment*, no "accommodation" of its freedoms can be "proper" except those made by the Framers themselves.

Unlike the right of privacy which, by the terms of the *Fourth Amendment*, must be accommodated with reasonable searches and seizures [***815] and warrants issued by magistrates, the rights of free speech and of a free press were protected by the Framers in verbiage whose proscription seems clear. I have stated before my view that the *First Amendment* would bar Congress from passing any libel law. [1] This was the view held by Thomas Jefferson [2] and it is one Congress has never challenged through enactment of a civil libel statute. The sole congressional attempt at this variety of *First Amendment* muzzle was in the Sedition Act of 1798 -- a criminal libel act never tested in this Court and one which expired by its terms three years after enactment. As President, Thomas Jefferson pardoned those who were convicted under the Act, and fines levied in its prosecution were repaid by Act of Congress. [3] The general [*357] consensus was that the Act constituted a regrettable legislative exercise plainly in violation of the *First Amendment*. [4]

1 See, *e. g., Rosenblatt v. Baer, 383 U.S. 75, 90* (concurring).

2 In 1798 Jefferson stated:

> "[The *First Amendment*] thereby [guards] in the same sentence, and under the same words, the freedom of religion, of speech, and of the press: insomuch, that whatever violates either, throws down the sanctuary which covers the others, *and that libels, falsehood, and defamation, equally with heresy and false religion, are withheld from the cognizance of federal tribunals*. . . ." 8 The

Works of Thomas Jefferson 464-465 (Ford ed. 1904) (emphasis added).

3 See, *e. g.*, Act of July 4, 1840, c. 45, 6 Stat. 802, accompanied by H. R. Rep. No. 86, 26th Cong., 1st Sess. (1840).

4 Senator Calhoun in reporting to Congress assumed the invalidity of the Act to be a matter "which no one now doubts." Report with Senate Bill No. 122, S. Doc. No. 118, 24th Cong., 1st Sess., 3 (1836).

With the *First Amendment* made applicable to the States through the Fourteenth, [5] I do not see how States have any more ability to "accommodate" freedoms of speech or of the press than does Congress. This is true whether the form of the accommodation is civil or criminal since "[what] a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel." *New York Times Co. v. Sullivan, 376 U.S. 254, 277.* Like Congress, States are without power "to use a civil libel law or any other law to impose damages for merely [**3016] discussing public affairs." *Id., at 295* (Black, J., concurring).[6]

5 See *Stromberg v. California, 283 U.S. 359, 368-369.*

6 Since this case involves a discussion of public affairs, I need not decide at this point whether the *First Amendment* prohibits all libel actions. "An unconditional right to say what one pleases about public affairs is what I consider to be the *minimum* guarantee of the *First Amendment.*" *New York Times Co. v. Sullivan, 376 U.S. 254, 297* (Black, J., concurring) (emphasis added). But "public affairs" includes a great deal more than merely political affairs. Matters of science, economics, business, art, literature, etc., are all matters of interest to the general public. Indeed, any matter of sufficient general interest to prompt media coverage may be said to be a public affair. Certainly police killings, "Communist conspiracies," and the like qualify.

A more regressive view of free speech has surfaced but it has thus far gained no judicial acceptance. Solicitor General Bork has stated:

"Constitutional protection should be accorded only to speech that is explicitly political. There is no basis for judicial intervention to protect any other form of expression, be it scientific, literary or that variety of expression we call obscene or pornographic. Moreover, within that category of speech we ordinarily call political, there should be no constitutional obstruction to laws making criminal any speech that advocates forcible overthrow of the government or the violation of any law." Bork, Neutral Principles and Some *First Amendment* Problems, 47 Ind. L. J. 1, 20 (1971).

According to this view, Congress, upon finding a painting aesthetically displeasing or a novel poorly written or a revolutionary new scientific theory unsound could constitutionally prohibit exhibition of the painting, distribution of the book or discussion of the theory. Congress might also proscribe the advocacy of the violation of any law, apparently without regard to the law's constitutionality. Thus, were Congress to pass a blatantly invalid law such as one prohibiting newspaper editorials critical of the Government, a publisher might be punished for advocating its violation. Similarly, the late Dr. Martin Luther King, Jr., could have been punished for advising blacks to peacefully sit in the front of buses or to ask for service in restaurants segregated by law.

[*358] Continued [***816] recognition of the possibility of state libel suits for public discussion of public issues leaves the freedom of speech honored by the *Fourteenth Amendment* a diluted version of *First Amendment* protection. This view is only possible if one accepts the position that the *First Amendment* is applicable to the States only through the Due Process Clause of the Fourteenth, due process freedom of speech being only that freedom which this Court might deem to be "implicit in the concept of ordered liberty." [7] But the Court frequently has rested [*359] state free speech and free press decisions on the *Fourteenth Amendment* generally [8] rather than on the Due Process Clause alone. The *Fourteenth Amendment* speaks not only of due process but also of "privileges and immunities" of United States citizenship. I can conceive of no privilege or immunity with a higher claim to recognition [**3017] against state abridgment than the freedoms of speech and of the press. In our federal system we are all subject to two governmental regimes, and freedoms of speech and of the press protected against the infringement of only one are quite illusory. The identity of the oppressor is, I would think, a matter of relative indifference to the

oppressed.

7 See *Palko v. Connecticut, 302 U.S. 319, 325.* As Mr. Justice Black has noted, by this view the test becomes "whether the government has an interest in abridging the right involved and, if so, whether that interest is of sufficient importance, *in the opinion of a majority of the Supreme Court,* to justify the government's action in doing so. Such a doctrine can be used to justify almost any government suppression of *First Amendment* freedoms. As I have stated many times before, I cannot subscribe to this doctrine because I believe that the *First Amendment's* unequivocal command that there shall be no abridgement of the rights of free speech shows that the men who drafted our *Bill of Rights* did all the 'balancing' that was to be done in this field." H. Black, A Constitutional Faith 52 (1969).

8 See, *e. g., Bridges v. California, 314 U.S. 252, 263 n. 6 (Black, J.); Murdock v. Pennsylvania, 319 U.S. 105, 108 (DOUGLAS, J.); Saia v. New York, 334 U.S. 558, 560 (DOUGLAS, J.); Talley v. California, 362 U.S. 60, 62 (Black, J.); DeGregory v. Attorney General of New Hampshire, 383 U.S. 825, 828 (DOUGLAS, J.); Elfbrandt v. Russell, 384 U.S. 11, 18 (DOUGLAS, J.); Mills v. Alabama, 384 U.S. 214, 218 (Black, J.); Mine Workers v. Illinois Bar Assn., 389 U.S. 217, 221-222, and n. 4 (Black, J.).*

There can be no doubt that a State impinges upon free and open discussion when it sanctions the imposition of damages for such discussion through its civil libel laws. Discussion of public affairs is often marked by highly charged emotions, and jurymen, not unlike us all, are [***817] subject to those emotions. It is indeed this very type of speech which is the reason for the *First Amendment* since speech which arouses little emotion is little in need of protection. The vehicle for publication in this case was the American Opinion, a most controversial periodical which disseminates the views of the John Birch Society, an organization which many deem to be [*360] quite offensive. The subject matter involved "Communist plots," "conspiracies against law enforcement agencies," and the killing of a private citizen by the police. With any such amalgam of controversial elements pressing upon the jury, a jury determination, unpredictable in the most neutral circumstances, becomes for those who venture to discuss heated issues, a virtual roll of the dice separating them from liability for often massive claims of damage.

It is only the hardy publisher who will engage in discussion in the face of such risk, and the Court's preoccupation with proliferating standards in the area of libel increases the risks. It matters little whether the standard be articulated as "malice" or "reckless disregard of the truth" or "negligence," for jury determinations by any of those criteria are virtually unreviewable. This Court, in its continuing delineation of variegated mantles of *First Amendment* protection, is, like the potential publisher, left with only speculation on how jury findings were influenced by the effect the subject matter of the publication had upon the minds and viscera of the jury. The standard announced today leaves the States free to "define for themselves the appropriate standard of liability for a publisher or broadcaster" in the circumstances of this case. This of course leaves the simple negligence standard as an option, with the jury free to impose damages upon a finding that the publisher failed to act as "a reasonable man." With such continued erosion of *First Amendment* protection, I fear that it may well be the reasonable man who refrains from speaking.

Since in my view the *First* and *Fourteenth Amendments* prohibit the imposition of damages upon respondent for this discussion of public affairs, I would affirm the judgment below.

[*361] MR. JUSTICE BRENNAN, dissenting.

I agree with the conclusion, expressed in Part V of the Court's opinion, that, at the time of publication of respondent's article, petitioner could not properly have been viewed as either a "public official" or "public figure"; instead, respondent's article, dealing with an alleged conspiracy to discredit local police forces, concerned petitioner's purported involvement in "an event of public or general interest." *Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 31-32 (1971)*; see *ante,* at 331-332, n. 4. I cannot agree, however, that free and robust debate -- so essential to the proper functioning of our system of government -- is permitted adequate "breathing space," *NAACP v. Button, 371 U.S. 415, 433 (1963),* when, as the Court holds, the States may impose all but strict liability for defamation if the defamed party is a private person and "the substance of the defamatory statement 'makes substantial danger to reputation apparent.'" *Ante,* at 348. [1] [***818] I adhere to my view expressed [**3018] in *Rosenbloom v. Metromedia, Inc.,*

supra, that we strike the proper accommodation between avoidance of media self-censorship and protection of individual reputations only when we require States to apply the *New York Times Co. v. Sullivan, 376 U.S. 254 (1964)*, knowing-or-reckless-falsity standard in civil libel actions concerning media reports of the involvement of private individuals in events of public or general interest.

1 A *fortiori* I disagree with my Brother WHITE's view that the States should have free rein to impose strict liability for defamation in cases not involving public persons.

The Court does not hold that *First Amendment* guarantees do not extend to speech concerning private persons' involvement in events of public or general interest. It recognizes that self-governance in this country perseveres because of our "profound national commitment [*362] to the principle that debate on *public issues* should be uninhibited, robust, and wide-open. " *Id., at 270* (emphasis added). Thus, guarantees of free speech and press necessarily reach "far more than knowledge and debate about the strictly official activities of various levels of government," *Rosenbloom v. Metromedia, Inc., supra, at 41*; for "[freedom] of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Thornhill v. Alabama, 310 U.S. 88, 102 (1940).*

The teaching to be distilled from our prior cases is that, while public interest in events may at times be influenced by the notoriety of the individuals involved, "[the] public's primary interest is in the event[,] . . . the conduct of the participant and the content, effect, and significance of the conduct...." *Rosenbloom, supra, at 43.* Matters of public or general interest do not "suddenly become less so merely because a private individual is involved, or because in some sense the individual did not 'voluntarily' choose to become involved." *Ibid.* See *Time, Inc . v. Hill, 385 U.S. 374, 388 (1967).*

Although acknowledging that *First Amendment* values are of no less significance when media reports concern private persons' involvement in matters of public concern, the Court refuses to provide, in such cases, the same level of constitutional protection that has been afforded the media in the context of defamation of public persons. The accommodation that this Court has established between free speech and libel laws in cases involving public officials and public figures -- that defamatory falsehood be shown by clear and convincing evidence to have been published with knowledge of falsity or with reckless disregard of truth -- is not apt, the Court holds, because [*363] the private individual does not have the same degree of access to the media to rebut defamatory comments as does the public person and he has not voluntarily exposed himself to public scrutiny.

While these arguments are forcefully and eloquently presented, I [***819] cannot accept them, for the reasons I stated in *Rosenbloom*:

"The *New York Times* standard was applied to libel of a public official or public figure to give effect to the [First] Amendment's function to encourage ventilation of public issues, not because the public official has any less interest in protecting his reputation than an individual in private life. While the argument that public figures need less protection because they can command media attention to counter criticism may be true for some very prominent people, even then it is the rare case where the denial overtakes the original charge. Denials, retractions, and corrections are not 'hot' news, and rarely receive the prominence of the original story. When the public official or public figure is a minor functionary, or has left the position that put him in the public [**3019] eye . . . , the argument loses all of its force. In the vast majority of libels involving public officials or public figures, the ability to respond through the media will depend on the same complex factor on which the ability of a private individual depends: the unpredictable event of the media's continuing interest in the story. Thus the unproved, and highly improbable, generalization that an as yet [not fully defined] class of 'public figures' involved in matters of public concern will be better able to respond through the media than private individuals also involved in such matters seems too insubstantial [*364] a reed on which to rest a constitutional distinction." *403 U.S., at 46-47.*

Moreover, the argument that private persons should not be required to prove *New York Times* knowing-or-reckless falsity because they do not assume the risk of defamation by freely entering the public arena "bears little relationship either to the values protected by the *First Amendment* or to the nature of our society." *Id., at 47.* Social interaction exposes all of us to some degree of public view. This Court has observed that "[the] risk of this exposure is an essential incident of life in a society

which places a primary value on freedom of speech and of press." *Time, Inc. v. Hill, 385 U.S., at 388.* Therefore,

"[voluntarily] or not, we are all 'public' men to some degree. Conversely, some aspects of the lives of even the most public men fall outside the area of matters of public or general concern. See . . . *Griswold v. Connecticut, 381 U.S. 479 (1965).* Thus, the idea that certain 'public' figures have voluntarily exposed their entire lives to public inspection, while private individuals have kept theirs carefully shrouded from public view is, at best, a legal fiction. In any event, such a distinction could easily produce the paradoxical result of dampening discussion of issues of public or general concern because they happen to involve private citizens while extending constitutional encouragement to discussion of aspects of the lives of 'public figures' that are not in the area of public or general concern." *Rosenbloom, supra, at 48* (footnote omitted).

To be sure, no one commends publications which defame the good name and reputation of any person: "In an ideal world, the responsibility of the press would match the freedom [***820] and public trust given it." *Id., at* [*365] *51.* [2] Rather, as the Court agrees, some abuse of *First Amendment* freedoms is tolerated only to insure that would-be commentators on events of public or general interest are not "deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do [**3020] so." *New York Times Co. v. Sullivan, 376 U.S., at 279.* The Court's holding and *a fortiori* my Brother WHITE's views, see n. 1, *supra*, simply deny free expression its needed "breathing space." Today's decision will exacerbate the rule of self-censorship of legitimate utterance as publishers "steer far wider of the unlawful zone," *Speiser v. Randall, 357 U.S. 513, 526 (1958).*

2 A respected commentator has observed that factors other than purely legal constraints operate to control the press:

"Traditions, attitudes, and general rules of political conduct are far more important controls. The fear of opening a credibility gap, and thereby lessening one's influence, holds some participants in check. Institutional pressures in large organizations, including some of the press, have a similar effect; it is difficult for an organization to have an open policy of making intentionally false accusations." T. Emerson, The System of Freedom of Expression 538 (1970).

Typical of the press' own ongoing self-evaluation is a proposal to establish a national news council, composed of members drawn from the public and the journalism profession, to examine and report on complaints concerning the accuracy and fairness of news reporting by the largest newsgathering sources. Twentieth Century Fund Task Force Report for a National News Council, A Free and Responsive Press (1973). See also Comment, The Expanding Constitutional Protection for the News Media from Liability for Defamation: Predictability and the New Synthesis, 70 Mich. L. Rev. 1547, 1569-1570 (1972).

We recognized in *New York Times Co. v. Sullivan, supra, at 279*, that a rule requiring a critic of official conduct to guarantee the truth of all of his factual contentions would inevitably lead to self-censorship when [*366] publishers, fearful of being unable to prove truth or unable to bear the expense of attempting to do so, simply eschewed printing controversial articles. Adoption, by many States, of a reasonable-care standard in cases where private individuals are involved in matters of public interest -- the probable result of today's decision -- will likewise lead to self-censorship since publishers will be required carefully to weigh a myriad of uncertain factors before publication. The reasonable-care standard is "elusive," *Time, Inc. v. Hill, supra, at 389*; it saddles the press with "the intolerable burden of guessing how a jury might assess the reasonableness of steps taken by it to verify the accuracy of every reference to a name, picture or portrait." *Ibid.* Under a reasonable-care regime, publishers and broadcasters will have to make pre-publication judgments about juror assessment of such diverse considerations as the size, operating procedures, and financial condition of the newsgathering system, as well as the relative costs and benefits of instituting less frequent and more costly reporting at a higher level of accuracy. See The Supreme Court, 1970 Term, 85 Harv. L. Rev. 3, 228 (1971). Moreover, in contrast to proof by clear and convincing evidence required under the *New York Times* test, the burden of proof for reasonable care will doubtless be the preponderance of the evidence.

[***821] "In the normal civil suit where [the preponderance of the evidence] standard is employed, 'we

view it as no more serious in general for there to be an erroneous verdict in the defendant's favor than for there to be an erroneous verdict in the plaintiff's favor.' *In re Winship, 397 U.S. 358, 371 (1970)* (HARLAN, J., concurring). In libel cases, however, we view an erroneous verdict for the plaintiff as most serious. Not only does it mulct the defendant for an innocent misstatement . . . but the [*367] possibility of such error, even beyond the vagueness of the negligence standard itself, would create a strong impetus toward self-censorship, which the *First Amendment* cannot tolerate." *Rosenbloom, 403 U.S., at 50.*

And, most hazardous, the flexibility which inheres in the reasonable-care standard will create the danger that a jury will convert it into "an instrument for the suppression of those 'vehement, caustic, and sometimes unpleasantly sharp attacks,' . . . which must be protected if the guarantees of the *First* and *Fourteenth Amendments* are to prevail." *Monitor Patriot Co. v. Roy, 401 U.S. 265, 277 (1971).*

The Court does not discount altogether the danger that jurors will punish for the expression of unpopular opinions. This probability accounts for the Court's limitation that "the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth." *Ante*, at 349. But plainly a jury's latitude to impose liability for want of due care poses a far greater threat of suppressing unpopular views than does a possible recovery of presumed or punitive damages. Moreover, the Court's [**3021] broad-ranging examples of "actual injury," including impairment of reputation and standing in the community, as well as personal humiliation, and mental anguish and suffering, inevitably allow a jury bent on punishing expression of unpopular views a formidable weapon for doing so. Finally, even a limitation of recovery to "actual injury" -- however much it reduces the size or frequency of recoveries -- will not provide the necessary elbowroom for *First Amendment* expression.

"It is not simply the possibility of a judgment for damages that results in self-censorship. The very [*368] possibility of having to engage in litigation, an expensive and protracted process, is threat enough to cause discussion and debate to 'steer far wider of the unlawful zone' thereby keeping protected discussion from public cognizance. . . . Too, a small newspaper suffers equally from a substantial damage award, whether the label of the award be 'actual' or 'punitive.'" *Rosenbloom, supra, at 52-53.*

On the other hand, the uncertainties which the media face under today's decision are largely avoided by the *New York Times* standard. I reject the argument that my *Rosenbloom* view improperly commits to judges the task of determining what is and what is not an issue of "general or public interest." [3] I noted in *Rosenbloom* [*369] [***822] that performance of this task would not always be easy. *Id., at 49 n. 17.* But surely the courts, the ultimate arbiters of all disputes concerning clashes of constitutional values, would only be performing one of their traditional functions in undertaking this duty. Also, the difficulty of this task has been substantially lessened by that "sizable body of cases, decided both before and after *Rosenbloom*, that have employed the concept of a matter of public concern to reach decisions in . . . cases dealing with an alleged libel of a private individual that employed a public interest standard . . . and . . . cases that applied *Butts* to the alleged libel of a public figure." Comment, The Expanding Constitutional Protection for the News Media from Liability for Defamation: Predictability and the New Synthesis, 70 Mich. L. Rev. 1547, 1560 (1972). The public interest is necessarily broad; any residual self-censorship that may result from the uncertain contours of the "general or public interest" concept should be of far less concern to publishers and broadcasters than that occasioned by state laws imposing liability for negligent falsehood.

3 The Court, taking a novel step, would not limit application of *First Amendment* protection to private libels involving issues of general or public interest, but would forbid the States from imposing liability without fault in any case where the substance of the defamatory statement made substantial danger to reputation apparent. As in *Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 44 n. 12, 48-49, n. 17 (1971)*, I would leave open the question of what constitutional standard, if any, applies when defamatory falsehoods are published or broadcast concerning either a private or public person's activities not within the scope of the general or public interest.

Parenthetically, my Brother WHITE argues that the Court's view and mine will prevent a plaintiff -- unable to demonstrate some degree of

fault -- from vindicating his reputation by securing a judgment that the publication was false. This argument overlooks the possible enactment of statutes, not requiring proof of fault, which provide for an action for retraction or for publication of a court's determination of falsity if the plaintiff is able to demonstrate that false statements have been published concerning his activities. Cf. Note, Vindication of the Reputation of a Public Official, 80 Harv. L. Rev. 1730, 1739-1747 (1967). Although it may be that questions could be raised concerning the constitutionality of such statutes, certainly nothing I have said today (and, as I read the Court's opinion, nothing said there) should be read to imply that a private plaintiff, unable to prove fault, must inevitably be denied the opportunity to secure a judgment upon the truth or falsity of statements published about him. Cf. *Rosenbloom v. Metromedia, Inc., supra, at 47*, and n. 15.

Since petitioner failed, after having been given a full and fair opportunity, to prove that respondent published the [**3022] disputed article with knowledge of its falsity or with reckless disregard of the truth, see *ante*, at 329-330, n. 2, I would affirm the judgment of the Court of Appeals.

MR. JUSTICE WHITE, dissenting.

For some 200 years -- from the very founding of the Nation -- the law of defamation and right of the ordinary citizen to recover for false publication injurious to his reputation have been almost exclusively the business of [*370] state courts and legislatures. Under typical state defamation law, the defamed private citizen had to prove only a false publication that would subject him to hatred, contempt, or ridicule. Given such publication, general damage to reputation was presumed, while punitive damages required proof of additional facts. The law governing the defamation of private citizens remained untouched by the *First Amendment* because until relatively recently, the consistent view of the Court was that libelous words constitute a class of speech wholly unprotected by the *First Amendment*, [***823] subject only to limited exceptions carved out since 1964.

But now, using that Amendment as the chosen instrument, the Court, in a few printed pages, has federalized major aspects of libel law by declaring unconstitutional in important respects the prevailing defamation law in all or most of the 50 States. That result is accomplished by requiring the plaintiff in each and every defamation action to prove not only the defendant's culpability beyond his act of publishing defamatory material but also actual damage to reputation resulting from the publication. Moreover, punitive damages may not be recovered by showing malice in the traditional sense of ill will; knowing falsehood or reckless disregard of the truth will now be required.

I assume these sweeping changes will be popular with the press, but this is not the road to salvation for a court of law. As I see it, there are wholly insufficient grounds for scuttling the libel laws of the States in such wholesale fashion, to say nothing of deprecating the reputation interest of ordinary citizens and rendering them powerless to protect themselves. I do not suggest that the decision is illegitimate or beyond the bounds of judicial review, but it is an ill-considered exercise of the power entrusted to this Court, particularly when the [*371] Court has not had the benefit of briefs and argument addressed to most of the major issues which the Court now decides. I respectfully dissent.

I

Lest there be any mistake about it, the changes wrought by the Court's decision cut very deeply. In 1938, the Restatement of Torts reflected the historic rule that publication in written form of defamatory material -- material tending "so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him" [1] -- subjected the publisher to liability although no special harm to reputation was actually proved. [2] Restatement [*372] of Torts [**3023] § 569 (1938). [3] [***824] Truth was a defense, and some libels were privileged; but, given a false circulation, general damage to reputation was presumed and damages could be awarded by the jury, along with any special damages such as pecuniary loss and emotional distress. At the very least, the rule allowed the recovery of nominal damages for any defamatory publication actionable *per se* and thus performed

"a vindicatory function by enabling the plaintiff publicly to brand the defamatory publication as false. The salutary social value of this rule is preventive in character since it often permits a defamed person to expose the groundless character of a defamatory rumor

before harm to the reputation has resulted therefrom." *Id.*, § 569, comment b, p. 166.

1 Restatement of Torts § 559 (1938); see also W. Prosser, Law of Torts § 111, p. 739 (4th ed. 1971); 1 A. Hanson, Libel and Related Torts para. 14, pp. 21-22 (1969); 1 F. Harper & F. James, The Law of Torts § 5.1, pp. 349-350 (1956).

2 The observations in Part I of this opinion as to the current state of the law of defamation in the various States are partially based upon the Restatement of Torts, first published in 1938, and Tentative Drafts Nos. *11* and *12 of Restatement of Torts (Second)*, released in 1965 and 1966, respectively. The recent transmittal of Tentative Draft No. 20, dated April 25, 1974, to the American Law Institute for its consideration has resulted in the elimination of much of the discussion of the prevailing defamation rules and the suggested changes in many of the rules themselves previously found in the earlier Tentative Drafts. This development appears to have been largely influenced by the draftsmen's "sense for where the law of this important subject should be thought to stand." Restatement (Second) of Torts, p. vii (Tent. Draft No. 20, Apr. 25, 1974). It is evident that, to a large extent, these latest views are colored by the plurality opinion in *Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971)*. See, *e. g.*, Restatement (Second) of Torts, *supra*, at xiii, §§ 569, 580, 581A, 581B, 621. There is no indication in the latest draft, however, that the conclusions reached in Tentative Drafts Nos. 11 and 12 are not an accurate reflection of the case law in the States in the mid-1960's prior to the developments occasioned by the plurality opinion in *Rosenbloom*. See *infra*, at 374-375.

3 See also W. Prosser, *supra*, n. 1, § 112, p. 752 and n. 85; Murnaghan, From Figment to Fiction to Philosophy -- The Requirement of Proof of Damages in Libel Actions, 22 Cath. U. L. Rev. 1, 11-13 (1972).

If the defamation was not libel but slander, it was actionable *per se* only if it imputed a criminal offense; a venereal or loathsome and communicable disease; improper conduct of a lawful business; or unchastity by a woman. *Id.*, § 570. To be actionable, all other types of slanderous statements required proof of special damage other than actual loss of reputation or emotional distress, that special damage almost always being in the form of material or pecuniary loss of some kind. *Id.*, § 575 and comment b, pp. 185-187.

Damages for libel or slander *per se* included "harm caused thereby to the reputation of the person defamed or in the absence of proof of such harm, for the harm which normally results from such a defamation." *Id.*, § 621. At the heart of the libel-and-slander-*per-se* [*373] damage scheme lay the award of general damages for loss of reputation. They were granted without special proof because the judgment of history was that the content of the publication itself was so likely to cause injury and because "in many cases the effect of defamatory statements is so subtle and indirect that it is impossible directly to trace the effects thereof in loss to the person defamed." *Id.*, § 621, comment a, p. 314. [4] Proof of actual injury to reputation was itself insufficient proof of that special damage necessary to support liability for slander not actionable *per se*. But if special damage in the form of material or pecuniary loss were proved, general damages for injury to reputation could be had without further proof. "The plaintiff may recover not only for the special harm so caused, but also for general loss of reputation." *Id.*, § 575, comment a, p. 185. [5] The right to recover for [**3024] emotional distress depended upon the defendant's otherwise being liable for either libel or slander. *Id.*, § 623. Punitive damages were recoverable upon proof of special facts amounting to express malice. *Id.*, § 908 and comment b, p. 555.

4 Proof of the defamation itself established the fact of injury and the existence of some damage to the right of reputation, and the jury was permitted, even without any other evidence, to assess damages that were considered to be the natural or probable consequences of the defamatory words. Restatement of Torts § 621, comment a, p. 314 (1938); see also C. Gatley, Libel and Slander 1004 (6th ed. 1967); M. Newell, Slander and Libel § 721, p. 810 (4th ed. 1924); see generally C. McCormick, Law of Damages § 116, pp. 422-430 (1935). In this respect, therefore, the damages were presumed because of the impossibility of affixing an exact monetary amount for present and future injury to the plaintiff's reputation, wounded feelings and humiliation, loss of business, and any consequential physical illness or pain. *Ibid.*

5 See also Prosser, *supra*, n. 1, § 112, p. 761; Harper & James, *supra*, n. 1, § 5.14, p. 388; Note, Developments in the Law -- Defamation, 69 Harv. L. Rev. 875, 939-940 (1956).

[*374] Preparations in the mid-1960's for Restatement (Second) of Torts reflected what were deemed to be substantial changes in the law of defamation, primarily a trend toward limiting *per se* libels to those where the defamatory nature of the publication is apparent on its face, *i. e.*, where the "defamatory innuendo is apparent from the publication itself without reference to extrinsic facts by way of inducement." *Restatement (Second) of Torts § 569*, p. 29 (Tent. Draft No. 12, Apr. 27, 1966). Libels of this sort and slanders *per se* continued to be recognized as actionable without proof of special damage [***825] or injury to reputation. [6] All other defamations would require proof of special injury in the form of material or pecuniary loss. Whether this asserted change reflected the prevailing law was heavily debated, [7] but it was unquestioned at the time that there are recurring situations in which libel and slander are and should be actionable *per se*.

6 Also actionable *per se* were those libels where the imputation, although not apparent from the material itself, would have been slander *per se* if spoken rather than written.

7 *Restatement (Second) of Torts § 569*, pp. 29-45, 47-48 (Tent. Draft No. 12, Apr. 27, 1966); see also Murnaghan, *supra*, n. 3.

In surveying the current state of the law, the proposed Restatement (Second) observed that "[all] courts except Virginia agree that any libel which is defamatory upon its face is actionable without proof of damage . . . ." *Restatement (Second) of Torts § 569*, p. 84 (Tent. Draft No. 11, Apr. 15, 1965). Ten jurisdictions continued to support the old rule that libel not defamatory on its face and whose innuendo depends on extrinsic facts is actionable without proof of damage although slander would not be. Twenty-four jurisdictions were said to hold that libel not defamatory on its face is to be treated like slander and thus not actionable without proof of damage where [*375] slander would not be. *Id., § 569*, p. 86. The law in six jurisdictions was found to be in an unsettled state but most likely consistent with the Restatement (Second). *Id., § 569*, p. 88. The law in Virginia was thought to consider libel actionable without proof of special damage only where slander would be, regardless of whether the libel is defamatory on its face. *Id., § 569*, p. 89. All States, therefore, were at that time thought to recognize important categories of defamation that were actionable *per se*. [8] Nor was any question apparently raised at that time that upon proof of special damage in the form of material or pecuinary loss, general damages to reputation could be recovered without further proof.

8 Applying settled Illinois law, the District Court in this case held that it is libel *per se* to label someone a *Communist. 306 F.Supp. 310 (ND Ill. 1969)*.

Unquestionably, state law continued to recognize some absolute, as well as some conditional, privileges to publish defamatory materials, including the privilege of fair comment in defined situations. But it remained true that in a wide range of situations, the ordinary citizen could make out a prima facie case without proving more than a defamatory publication and could recover general damages for injury to his [***826] reputation unless defeated by the defense of truth. [9]

9 This appears to have been the law in Illinois at the time Gertz brought his libel suit. See, *e. g., Brewer v. Hearst Publishing Co., 185 F.2d 846 (CA7 1950)*; *Hotz v. Alton Telegraph Printing Co., 324 Ill. App. 1, 57 N. E. 2d 137 (1944)*; *Cooper v. Illinois Publishing & Printing Co., 218 Ill. App. 95 (1920)*.

The impact of today's decision on the traditional law of libel is immediately obvious and indisputable. No longer [**3025] will the plaintiff be able to rest his case with proof of a libel defamatory on its face or proof of a slander historically actionable *per se*. In addition, he must prove some further degree of culpable conduct on the part of the [*376] publisher, such as intentional or reckless falsehood or negligence. And if he succeeds in this respect, he faces still another obstacle: recovery for loss of reputation will be conditioned upon "competent" proof of actual injury to his standing in the community. This will be true regardless of the nature of the defamation and even though it is one of those particularly reprehensible statements that have traditionally made slanderous words actionable without proof of fault by the publisher or of the damaging impact of his publication. The Court rejects the judgment of experience that some publications are so inherently capable of injury, and

actual injury so difficult to prove, that the risk of falsehood should be borne by the publisher, not the victim. Plainly, with the additional burden on the plaintiff of proving negligence or other fault, it will be exceedingly difficult, perhaps impossible, for him to vindicate his reputation interest by securing a judgment for nominal damages, the practical effect of such a judgment being a judicial declaration that the publication was indeed false. Under the new rule the plaintiff can lose, not because the statement is true, but because it was not negligently made.

So too, the requirement of proving special injury to reputation before general damages may be awarded will clearly eliminate the prevailing rule, worked out over a very long period of time, that, in the case of defamations not actionable *per se*, the recovery of general damages for injury to reputation may also be had if some form of material or pecuniary loss is proved. Finally, an inflexible federal standard is imposed for the award of punitive damages. No longer will it be enough to prove ill will and an attempt to injure.

These are radical changes in the law and severe invasions of the prerogatives of the States. They should [*377] at least be shown to be required by the *First Amendment* or necessitated by our present circumstances. Neither has been demonstrated.

Of course, *New York Times Co. v. Sullivan, 376 U.S. 254 (1964)*; *Rosenblatt v. Baer, 383 U.S. 75 (1966)*, and *Curtis Publishing Co.* v. *Butts and Associated Press v. Walker, 388 U.S. 130 (1967)*, have themselves worked major changes in defamation law. Public officials and public figures, if they are to recover general damages for injury to reputation, must prove knowing falsehood or reckless disregard for the truth. The States were required to conform to these decisions. Thereafter in *Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971)*, three Members of the [***827] Court urged that the same standard be applied whenever the publication concerned an event of public or general concern. But none of these cases purported to foreclose in all circumstances recovery by the ordinary citizen on traditional standards of liability, and until today, a majority of the Court had not supported the proposition that, given liability, a court or jury may not award general damages in a reasonable amount without further proof of injury.

In the brief period since *Rosenbloom* was decided, at least 17 States and several federal courts of appeals have felt obliged to consider the *New York Times* constitutional privilege for liability as extending to, in the words of the *Rosenbloom* plurality, "all discussion and communication involving matters of public or general concern." *Id., at 44.* [10] Apparently, however, [**3027] general [*378] [***828] damages still remain recoverable once that standard of liability is satisfied. Except where public officials and public figures are concerned, the Court now repudiates [*379] the plurality opinion in *Rosenbloom* and appears to espouse the liability standard set forth by three other Justices in that case. The States must now struggle to [*380] discern the meaning of such ill-defined concepts as "liability without fault" and to fashion novel rules for the recovery of damages. These matters have not been briefed or argued by the parties and their workability has not been seriously explored. Nevertheless, yielding to the apparently irresistible impulse to announce a new and different interpretation of the *First Amendment*, the Court discards history and precedent in its rush to refashion defamation law in accordance with the inclinations of a perhaps evanescent majority of the Justices.

10 See, *e. g., West v. Northern Publishing Co., 487 P. 2d 1304, 1305-1306 (Alaska 1971)* (article linking owners of taxicab companies to illegal liquor sales to minors); *Gallman v. Carnes, 254 Ark. 987, 992, 497 S. W. 2d 47, 50 (1973)* (matter concerning state law school professor and assistant dean); *Belli v. Curtis Publishing Co., 25 Cal. App. 3d 384, 102 Cal. Rptr. 122 (1972)* (article concerning attorney with national reputation); *Moriarty v. Lippe, 162 Conn. 371, 378-379, 294 A. 2d 326, 330-331 (1972)* (publication about certain police officers); *Firestone v. Time, Inc., 271 So. 2d 745, 750-751 (Fla. 1972)* (divorce of prominent citizen not a matter of legitimate public concern); *State v. Snyder, 277 So. 2d 660, 666-668 (La. 1973)* (criminal defamation prosecution of a defeated mayoral candidate for statements made about another candidate); *Twohig v. Boston Herald-Traveler Corp., Mass. , , 291 N. E. 2d 398, 400-401 (1973)* (article concerning a candidate's votes in the legislature); *Priestley v. Hastings & Sons Publishing Co. of Lynn, 360 Mass. 118, 271 N. E. 2d 628 (1971)* (article about an architect commissioned by a town to build a school); *Harnish v. Herald-Mail Co., Inc., 264 Md. 326, 334-336, 286 A. 2d 146, 151 (1972)*

(article concerning substandard rental property owned by a member of a city housing authority); *Standke v. B. E. Darby & Sons, Inc., 291 Minn. 468, 476-477, 193 N. W. 2d 139, 145 (1971)* (newspaper editorial concerning performance of grand jurors); *Whitmore v. Kansas City Star Co., 499 S. W. 2d 45, 49 (Mo. Ct. App. 1973)* (article concerning a juvenile officer, the operation of a detention home, and a grand jury investigation); *Trails West, Inc. v. Wolff, 32 N. Y. 2d 207, 214-218, 298 N. E. 2d 52, 55-58 (1973)* (suit against a Congressman for an investigation into the death of schoolchildren in a bus accident); *Twenty-five East 40th Street Restaurant Corp. v. Forbes, Inc., 30 N. Y. 2d 595, 282 N. E. 2d 118 (1972)* (magazine article concerning a restaurant's food); *Kent v. City of Buffalo, 29 N. Y. 2d 818, 277 N. E. 2d 669 (1971)* (television station film of plaintiff as a captured robber); *Frink v. McEldowney, 29 N. Y. 2d 720, 275 N. E. 2d 337 (1971)* (article concerning an attorney representing a town); *Mead* v. *Horvitz Publishing Co.* (9th Dist. Ohio Ct. App. June 13, 1973) (unpublished), cert. denied, *416 U.S. 985 (1974)* (financial condition of participants in the development of a large apartment complex involving numerous local contractors); *Washington v. World Publishing Co., 506 P. 2d 913 (Okla. 1973)* (article about contract dispute between a candidate for United States Senate and his party's county chairman); *Matus v. Triangle Publications, Inc., 445 Pa. 384, 395-399, 286 A. 2d 357, 363-365 (1971)* (radio "talk show" host's discussion of gross overcharging for snowplowing a driveway not considered an event of public or general concern); *Autobuses Internacionales S. De R.L., Ltd. v. El Continental Publishing Co., 483 S. W. 2d 506 (Tex. Ct. Civ. App. 1972)* (newspaper article concerning a bus company's raising of fares without notice and in violation of law); *Sanders v. Harris, 213 Va. 369, 372-373, 192 S. E. 2d 754, 757-758 (1972)* (article concerning English professor at a community college); *Old Dominion Branch No. 496 v. Austin, 213 Va. 377, 192 S. E. 2d 737 (1972)*, rev'd, *ante*, p. 264 (plaintiff's failure to join a labor union considered not an issue of public or general concern); *Chase v. Daily Record, Inc., 83 Wash. 2d 37, 41, 515 P. 2d 154, 156 (1973)* (article concerning port district commissioner); *Miller v. Argus Publishing Co., 79 Wash. 2d 816, 827, 490 P. 2d 101, 109 (1971)* (article concerning the backer of political candidates); *Polzin v. Helmbrecht, 54 Wis. 2d 578, 586, 196 N. W. 2d 685, 690 (1972)* (letter to editor of newspaper concerning a reporter and the financing of pollution control measures).

The following United States Courts of Appeals have adopted the plurality opinion in *Rosenbloom: Cantrell v. Forest City Publishing Co., 484 F.2d 150 (CA6 1973)*, cert. pending, No. 73-5520 (article concerning family members of the victim of a highly publicized bridge disaster not actionable absent proof of actual malice); *Porter v. Guam Publications, Inc., 475 F.2d 744, 745 (CA9 1973)* (article concerning citizen's arrest for theft of a cash box considered an event of general or public interest); *Cervantes v. Time, Inc., 464 F.2d 986, 991 (CA8 1972)* (article concerning mayor and alleged organized crime connections conceded to be a matter of public or general concern); *Firestone v. Time, Inc., 460 F.2d 712 (CA5 1972)* (magazine article concerning prominent citizen's use of detectives and electronic surveillance in connection with a divorce); *Davis v. National Broadcasting Co., 447 F.2d 981 (CA5 1971)*, aff'g *320 F.Supp. 1070 (ED La. 1970)* (television report about a person caught up in the events surrounding the assassination of President Kennedy considered a matter of public interest). However, at least one Court of Appeals, faced with an appeal from summary judgment in favor of a publisher in a diversity libel suit brought by a Philadelphia retailer, has expressed "discomfort in accepting the *Rosenbloom* plurality opinion as a definitive statement of the appropriate law . . . ." *Gordon v. Random House, Inc., 486 F.2d 1356, 1359 (CA3 1973).*

As previously discussed in n. 2, *supra*, the latest proposed draft of Restatement (Second) of Torts substantially reflects the views of the *Rosenbloom* plurality. It also anticipates "that the Supreme Court will hold that strict liability for defamation is inconsistent with the free-speech provision of the *First Amendment* . . . ," *Restatement (Second) of Torts § 569*, p. 59 (Tent. Draft No. 20, Apr. 25, 1974), as well as the demise of *pre-Rosenbloom* damages rules. See *id*

., § 621, pp. 285-288.

II

The Court does not contend, and it could hardly do so, that those who wrote the *First Amendment* intended to prohibit the Federal Government, within its sphere of influence in the Territories and the District of Columbia, from providing the private citizen a peaceful remedy for damaging falsehood. At the time of the adoption of the *First Amendment*, many of the consequences of libel law already described had developed, particularly the rule that libels and some slanders were so inherently injurious that they were actionable without special proof of damage to reputation. As the Court pointed out in *Roth v. United States, 354 U.S. 476, 482 (1957), 10* of the 14 States that had ratified the Constitution by 1792 had themselves provided constitutional guarantees for free [*381] expression, and 13 of the 14 nevertheless provided for the prosecution of libels. Prior to the Revolution, the American Colonies had adopted the common law of libel. 11 [***829] Contrary to some popular notions, freedom of the press was sharply curtailed in colonial America. 12 Seditious libel was punished as a contempt by the colonial legislatures and as a criminal offense in the colonial courts. 13

11 Merin, Libel and the Supreme Court, 11 Wm. & Mary L. Rev. 371, 373 (1969).

12 A. Sutherland, Constitutionalism in America: Origin and Evolution of Its Fundamental Ideas 118-119 (1965).

13 See generally L. Levy, Legacy of Suppression: Freedom of Speech and Press in Early American History (1960).

Scant, if any, evidence exists that the *First Amendment* was intended to abolish the common law of libel, at least to the extent of depriving ordinary citizens of meaningful redress against their defamers. On the contrary,

"[it] is conceded on all sides that the common-law rules that subjected the libeler to responsibility for the private injury, or the public scandal or disorder occasioned by his conduct, are not abolished by the protection extended to the press in our constitutions." 2 T. Cooley, Constitutional Limitations 883 (8th ed. 1927).

Moreover, consistent with the Blackstone formula, 14 these [*382] common-law actions did not abridge freedom of the press. See generally L. Levy, Legacy of Suppression: Freedom of Speech and Press in Early American History 247-248 (1960); Merin, Libel and the Supreme Court, 11 Wm. & Mary L. Rev. 371, 376 (1969); Hallen, Fair Comment, [**3028] 8 Tex. L. Rev. 41, 56 (1929). Alexander Meiklejohn, who accorded generous reach to the *First Amendment*, nevertheless acknowledged:

"No one can doubt that, in any well-governed society, the legislature has both the right and the duty to prohibit certain forms of speech. Libelous assertions may be, and must be, forbidden and punished. So too must slander. . . . All these necessities that speech be limited are recognized and provided for under the Constitution. They were not unknown to the writers of the *First Amendment*. That amendment, then, we may take it for granted, *does not forbid the abridging of speech*. But, at the same time, *it does forbid the abridging of the freedom of speech*. It is to the solving of that paradox, that apparent self-contradiction, that we are summoned if, as free men, we wish to know what the right of freedom of speech is." Political Freedom, The Constitutional Powers of the People 21 (1965).

See also Leflar, The Free-ness of Free Speech, 15 Vand. L. Rev. 1073, 1080-1081 (1962).

14 The men who wrote and adopted the *First Amendment* were steeped in the common-law tradition of England. They read Blackstone, "a classic tradition of the bar in the United States" and "the oracle of the common law in the minds of the American Framers . . . ." J. Hurst, The Growth of American Law: The Law Makers 257 (1950); Levy, *supra*, n. 13, at 13; see also Sutherland, *supra*, n. 12, at 124-125; *Schick v. United States, 195 U.S. 65, 69 (1904)*. From him they learned that the major means of accomplishing free speech and press was to prevent prior restraints, the publisher later being subject to legal action if his publication was injurious. 4 W. Blackstone, Commentaries *150-153.

Professor Zechariah Chafee, a noted *First Amendment* scholar, has persuasively argued that conditions in 1791 "do not arbitrarily fix the division between lawful and unlawful speech for all time." Free Speech in the United States 14 (1954). 15 At the same

time, however, [*383] [***830] he notes that while the Framers may have intended to abolish seditious libels and to prevent any prosecutions by the Federal Government for criticism of the Government, [16] "the free speech clauses do not wipe out the common law as to obscenity, profanity, and defamation of individuals." [17]

15 See also Meiklejohn, The *First Amendment* Is An Absolute, 1961 Sup. Ct. Rev. 245, 264:

"First, the Framers initiated a political revolution whose development is still in process throughout the world. Second, like most revolutionaries, the Framers could not foresee the specific issues which would arise as their 'novel idea' exercised its domination over the governing activities of a rapidly developing nation in a rapidly and fundamentally changing world. In that sense, the Framers did not know what they were doing. And in the same sense, it is still true that, after two centuries of experience, we do not know what they were doing, or what we ourselves are now doing.

"In a more abstract and more significant sense, however, both they and we have been aware that the adoption of the principle of self-government by 'The People' of this nation set loose upon us and upon the world at large an idea which is still transforming men's conceptions of what they are and how they may best be governed."

16 See *Beauharnais v. Illinois, 343 U.S. 250, 272 (1952)* (Black, J., dissenting). Brant, who interprets the Framers' intention more liberally than Chafee, nevertheless saw the free speech protection as bearing upon criticism of government and other political speech. I. Brant, The *Bill of Rights* 236 (1965).

17 Z. Chafee, Free Speech in the United States 14 (1954).

The debates in Congress and the States over the *Bill of Rights* are unclear and inconclusive on any articulated intention of the Framers as to the free press guarantee. [18] We know that Benjamin Franklin, John Adams, and William Cushing favored limiting freedom of the press to truthful statements, while others such as James Wilson suggested a restatement of the Blackstone standard. [19] [*384] Jefferson endorsed Madison's formula that "Congress shall make no law . . . abridging the freedom of speech or the press" only after he suggested:

"The people shall not be deprived of their right to speak, to write, or *otherwise* to publish anything but false facts affecting injuriously the life, liberty, or reputation of others . . . ." F. Mott, Jefferson and the Press 14 (1943). [20]

[**3029] Doubt has been expressed that the Members of Congress envisioned the *First Amendment* as reaching even this far. Merin, Libel and the Supreme Court, 11 Wm. & Mary L. Rev. 371, § 379-380 (1969).

18 See 1 Annals of Cong. 729-789 (1789). See also Brant, *supra*, n. 16, at 224; Levy, *supra*, n. 13, at 214, 224.

19 Merin, *supra*, n. 11, at 377. Franklin, for example, observed:

"If by the *Liberty of the Press* were understood merely the Liberty of discussing the Propriety of Public Measures and political opinions, let us have as much of it as you please: But if it means the Liberty of affronting, calumniating, and defaming one another, I, for my part, own myself willing to part with my Share of it when our Legislators shall please so to alter the Law, and shall cheerfully consent to exchange my *Liberty* of Abusing others for the *Privilege* of not being abused myself." 10 B. Franklin, Writings 38 (Smyth ed. 1907).

20 Jefferson's noted opposition to public prosecutions for libel of government figures did not extend to depriving them of private libel actions. Mott, *supra*, at 43. There is even a strong suggestion that he favored state prosecutions. E. Hudon, Freedom of Speech and Press in America 47-48 (1963).

This Court in bygone years has repeatedly dealt with libel and slander actions from the District of Columbia and from the Territories. Although in these cases *First Amendment* considerations were not expressly discussed, the opinions of the Court unmistakably revealed that the classic law of libel was firmly in place in those areas where federal [***831] law controlled. See, *e. g., Washington Post Co. v. Chaloner, 250 U.S. 290 (1919)*; *Baker v. Warner, 231 U.S. 588 (1913)*; *Nalle v. Oyster, 230 U.S. 165 (1913)*; *Dorr v. United States, 195 U.S. 138 (1904)*; *Pollard v. Lyon, 91 U.S. 225 (1876)*; *White v.*

Nicholls, 3 How. 266 (1845).

The Court's consistent view prior to *New York Times Co. v. Sullivan, 376 U.S. 254 (1964)*, was that defamatory [*385] utterances were wholly unprotected by the *First Amendment*. In *Patterson v. Colorado ex rel. Attorney General, 205 U.S. 454, 462 (1907)*, for example, the Court said that although freedom of speech and press is protected from abridgment by the Constitution, these provisions "do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare." This statement was repeated in *Near v. Minnesota ex rel. Olson, 283 U.S. 697, 714 (1931)*, the Court adding:

"But it is recognized that punishment for the abuse of the liberty accorded to the press is essential to the protection of the public, and that the common law rules that subject the libeler to responsibility for the public offense, as well as for the private injury, are not abolished by the protection extended in our constitutions." *Id., at 715.*

Chaplinsky v. New Hampshire, 315 U.S. 568, 571-572 (1942) (footnotes omitted), reflected the same view:

"There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words -- those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."

Beauharnais v. Illinois, 343 U.S. 250, 254-257 (1952) (footnotes omitted), repeated the *Chaplinsky* statement, noting also that nowhere at the time of the adoption of [*386] the Constitution "was there any suggestion that the crime of libel be abolished." And in *Roth v. United States, 354 U.S., at 483* (footnote omitted), the Court further examined the meaning of the *First Amendment*:

"In light of this history, it is apparent that the unconditional phrasing of [**3030] the *First Amendment* was not intended to protect every utterance. This phrasing did not prevent this Court from concluding that libelous utterances are not within the area of constitutionally protected speech. *Beauharnais v. Illinois, 343 U.S. 250, 266.* At the time of the adoption of the *First Amendment*, obscenity law was not as fully developed as libel law, but there is sufficiently contemporaneous [***832] evidence to show that obscenity, too, was outside the protection intended for speech and press." [21]

21 For further expressions of the general proposition that libels are not protected by the *First Amendment*, see *Konigsberg v. State Bar of California, 366 U.S. 36, 49-50 and n. 10 (1961)*; *Times Film Corp. v. City of Chicago, 365 U.S. 43, 48 (1961)*; *Pennekamp v. Florida, 328 U.S. 331, 348-349 (1946)*; cf. *Paris Adult Theatre I v. Slaton, 413 U.S. 49, 67 (1973)*; *Stanley v. Georgia, 394 U.S. 557, 561 n. 5 (1969).*

The Court could not accept the generality of this historic view in *New York Times Co. v. Sullivan, supra.* There the Court held that the *First Amendment* was intended to forbid actions for seditious libel and that defamation actions by public officials were therefore not subject to the traditional law of libel and slander. If these officials (and, later, public figures occupying semi-official or influential, although private, positions) were to recover, they were required to prove not only that the publication was false but also that it was knowingly false or published with reckless disregard for its truth or falsity. This view that the *First Amendment* was written to forbid [*387] seditious libel reflected one side of the dispute that raged at the turn of the nineteenth century [22] and also mirrored the views of some later scholars. [23]

22 See Levy, *supra*, n. 13, at 247-248.

23 See, *e. g., Abrams v. United States, 250 U.S. 616, 630 (1919)* (Holmes, J., dissenting).

The central meaning of *New York Times*, and for me the *First Amendment* as it relates to libel laws, is that seditious libel -- criticism of government and public officials -- falls beyond the police power of the State. 376 U.S., at 273-276. [24] In a democratic society such as ours, the citizen has the privilege of criticizing his government and its officials. But neither *New York Times* nor its progeny suggest that the *First Amendment* intended in all circumstances to deprive the private citizen of his historic recourse to redress published

falsehoods damaging to reputation or that, contrary to history and precedent, the Amendment should now be so interpreted. Simply put, the *First Amendment* did not confer a "license to defame the citizen." W. Douglas, The Right of the People 36 (1958).

24 Kalven, The New York Times Case: A Note on "The Central Meaning of the *First Amendment*," 1964 Sup. Ct. Rev. 191, 208-209.

I do not labor the foregoing matters to contend that the Court is foreclosed from reconsidering prior interpretations of the *First Amendment*. [25] But the Court apparently finds a clean slate where in fact we have instructive historical experience dating from long before [*388] the first settlers, with their notions of democratic government and human freedom, journeyed to this land. Given this rich background of history and precedent and because we deal with fundamentals when we construe the *First Amendment*, we should proceed with [**3031] care and be presented with more compelling reasons before we jettison the settled law of the States to an even more radical extent. [26]

25 "The language of the *First Amendment* is to be read not as barren words found in a dictionary but as symbols of historic experience illumined by the presuppositions of those who employed them. . . . As in the case of every other provision of the Constitution that is not crystallized by the nature of its technical concepts, the fact that the *First Amendment* is not self-defining and self-enforcing neither impairs its usefulness nor compels its paralysis as a living instrument." *Dennis v. United States, 341 U.S. 494, 523 (1951)* (Frankfurter, J., concurring).

26 "[The] law of defamation has been an integral part of the laws of England, the colonies and the states since time immemorial. So many actions have been maintained and judgments recovered under the various laws of libel that the Constitutional validity of libel actions could be denied only by a Court willing to hold all of its predecessors were wrong in their interpretation of the *First Amendment* and that two hundred years of precedents should be overruled." Rutledge, The Law of Defamation: Recent Developments, 32 Alabama Lawyer 409, 410 (1971).

The prevailing common-law libel rules in this country have remained in England and the Commonwealth nations. Pedrick, Freedom of the Press and the Law of Libel: The Modern Revised Translation, 49 Cornell L. Q. 581, 583-584 (1964). After many years of reviewing the English law of defamation, the Porter Committee concluded that "though the law as to defamation requires some modification, the basic principles upon which it is founded are not amiss." Report of the Committee on the Law of Defamation, Cmd. No. 7536, para. 222, p. 48 (1948).

III

[***833] The Court concedes that the dangers of self-censorship are insufficient to override the state interest in protecting the reputation of private individuals who are both more helpless and more deserving of state concern than public persons with more access to the media to defend themselves. It therefore refuses to condition the private plaintiff's recovery on a showing of intentional or reckless falsehood as required by *New York Times*. But the Court nevertheless extends the reach of the *First Amendment* to all defamation actions by requiring that the ordinary [*389] citizen, when libeled by a publication defamatory on its face, must prove some degree of culpability on the part of the publisher beyond the circulation to the public of a damaging falsehood. A rule at least as strict would be called for where the defamatory character of the publication is not apparent from its face. *Ante*, at 348. [27] Furthermore, if this major hurdle to establish liability is surmounted, the Court requires proof of actual injury to reputation before any damages for such injury may be awarded.

27 If I read the Court correctly, it clearly implies that for those publications that do not make "substantial danger to reputation apparent," the *New York Times* actual-malice standard will apply. Apparently, this would be true even where the imputation concerned conduct or a condition that would be *per se* slander.

The Court proceeds as though it were writing on *tabula rasa* and suggests that it must mediate between two unacceptable choices -- on the one hand, the rigors of the *New York Times* rule which the Court thinks would give insufficient recognition to the interest of the private plaintiff, and, on the other hand, the prospect of imposing "liability without fault" on the press and others who are charged with defamatory utterances. Totally ignoring history and settled *First Amendment* law, the Court

purports to arrive at an "equitable compromise," rejecting both what it considers faultless liability and *New York Times* malice, but insisting on some intermediate degree of fault. Of course, the Court necessarily discards the contrary judgment arrived at in the 50 States that the reputation interest of the private citizen is deserving of considerably more protection.

The Court evinces a deep-seated antipathy to "liability without fault." But this catch-phrase has no talismanic significance and is almost meaningless in this context where the Court appears to be addressing those libels and slanders that are defamatory on their face and where [*390] the publisher is no doubt aware from the nature of the material that it would be inherently damaging to reputation. He publishes [***834] notwithstanding, knowing that he will inflict injury. With this knowledge, he must intend to inflict that injury, his excuse being that he is privileged to do so -- that he has published the truth. But as it turns out, what he has circulated to the public [**3032] is a very damaging falsehood. Is he nevertheless "faultless"? Perhaps it can be said that the mistake about his defense was made in good faith, but the fact remains that it is he who launched the publication knowing that it could ruin a reputation.

In these circumstances, the law has heretofore put the risk of falsehood on the publisher where the victim is a private citizen and no grounds of special privilege are invoked. The Court would now shift this risk to the victim, even though he has done nothing to invite the calumny, is wholly innocent of fault, and is helpless to avoid his injury. I doubt that jurisprudential resistance to liability without fault is sufficient ground for employing the *First Amendment* to revolutionize the law of libel, and in my view, that body of legal rules poses no realistic threat to the press and its service to the public. The press today is vigorous and robust. To me, it is quite incredible to suggest that threats of libel suits from private citizens are causing the press to refrain from publishing the truth. I know of no hard facts to support that proposition, and the Court furnishes none.

The communications industry has increasingly become concentrated in a few powerful hands operating very lucrative businesses reaching across the Nation and into almost every home. [28] Neither the industry as a whole nor [*391] its individual components are easily intimidated, and we are fortunate that they are not. Requiring them to pay for the occasional damage they do to private reputation will play no substantial part in their future performance or their existence.

28 A recent study has comprehensively detailed the role and impact of mass communications in this Nation. See Note, Media and the *First Amendment* in a Free Society, 60 Geo. L. J. 867 (1972). For example, 99% of the American households have a radio, and 77% hear at least one radio newscast daily. In 1970, the yearly average home television viewing time was almost six hours per day. *Id.*, at 883 n. 53.

"Sixty years ago, 2,442 newspapers were published daily nationwide, and 689 cities had competing dailies. Today, in only 42 of the cities served by one of the 1,748 American daily papers is there a competing newspaper under separate ownership. Total daily circulation has passed 62 million copies, but over 40 percent of this circulation is controlled by only 25 ownership groups.

"Newspaper owners have profited greatly from the consolidation of the journalism industry. Several of them report yearly profits in the tens of millions of dollars, with after tax profits ranging from seven to 14 percent of gross revenues. Unfortunately, the owners have made their profits at the expense of the public interest in free expression. As the broad base of newspaper ownership narrows, the variation of facts and opinions received by the public from antagonistic sources is increasingly limited. Newspaper publication is indeed a leading American industry. Through its evolution in this direction, the press has come to be dominated by a select group whose prime interest is economic.

"The effect of consolidation within the newspaper industry is magnified by the degree of intermedia ownership. Sixty-eight cities have a radio station owned by the only local daily newspaper, and 160 television stations have newspaper affiliations. In 11 cities diversity of ownership is completely lacking with the only television station and newspaper under the same control." *Id.*, at 892-893 (footnotes omitted).

See also Congress, FCC Consider Newspaper Control of Local TV, 32 Cong. Q. 659-663

(1974).

In [***835] any event, if the Court's principal concern is to protect the communications industry from large libel judgments, it would appear that its new requirements with respect to general and punitive damages would be ample protection. Why it also feels compelled to escalate the threshold standard of liability I cannot fathom, [*392] particularly when this will eliminate in many instances the plaintiff's possibility of securing a judicial determination that the damaging publication was indeed false, whether or not he is entitled to recover money damages. Under the Court's new rules, the plaintiff must prove not only the defamatory statement but also some degree of fault accompanying it. The publication may be wholly false and the wrong to him [**3033] unjustified, but his case will nevertheless be dismissed for failure to prove negligence or other fault on the part of the publisher. I find it unacceptable to distribute the risk in this manner and force the wholly innocent victim to bear the injury; for, as between the two, the defamer is the only culpable party. It is he who circulated a falsehood that he was not required to publish.

It is difficult for me to understand why the ordinary citizen should himself carry the risk of damage and suffer the injury in order to vindicate *First Amendment* values by protecting the press and others from liability for circulating false information. This is particularly true because such statements serve no purpose whatsoever in furthering the public interest or the search for truth but, on the contrary, may frustrate that search and at the same time inflict great injury on the defenseless individual. The owners of the press and the stockholders of the communications enterprises can much better bear the burden. And if they cannot, the public at large should somehow pay for what is essentially a public benefit derived at private expense.

IV

A

Not content with escalating the threshold requirements of establishing liability, the Court abolishes the ordinary damages rule, undisturbed by *New York Times* [*393] and later cases, that, as to libels or slanders defamatory on their face, injury to reputation is presumed and general damages may be awarded along with whatever special damages may be sought. Apparently because the Court feels that in some unspecified and unknown number of cases, plaintiffs recover where they have suffered no injury or recover more than they deserve, it dismisses this rule as an "oddity of tort law." The Court thereby refuses in *any* case to accept the fact of wide dissemination of a *per se* libel as prima facie proof of injury sufficient to survive a motion to dismiss at the close of plaintiff's case.

I have said before, but it bears repeating, that even if the plaintiff should recover no monetary damages, he should be able to prevail and have a judgment that the publication is false. But beyond that, courts and legislatures literally for centuries have thought that in the generality of cases, libeled plaintiffs will be seriously shortchanged if they must prove the extent of the injury to their reputations. Even where libels or slanders are not on their face defamatory and special damage must be shown, when that showing is made, general damages [***836] for reputation injury are recoverable without specific proof. [29]

29 Having held that the defamation plaintiff is limited to recovering for "actual injury," the Court hastens to add:

> "Suffice it to say that actual injury is not limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering." *Ante*, at 350.
>
> It should be pointed out that under the prevailing law, where the defamation is not actionable *per se* and proof of "special damage" is required, a showing of actual injury to reputation is insufficient; but if pecuniary loss is shown, general reputation damages are recoverable. The Court changes the latter, but not the former, rule. Also under present law, pain and suffering, although shown, do not warrant damages in any defamation action unless the plaintiff is otherwise entitled to at least nominal damages. By imposing a more difficult standard of liability and requiring proof of actual damage to reputation, recovery for pain and suffering, though real, becomes a much more remote possibility.

[*394] The Court is clearly right when at one point it states that "the law of defamation is rooted in our

experience that the truth rarely catches up with a lie." *Ante*, at 344 n. 9. But it ignores what that experience teaches, *viz.*, that damage to reputation is recurringly difficult to prove and that requiring actual proof would repeatedly destroy any chance for [**3034] adequate compensation. Eminent authority has warned that

"it is clear that proof of actual damage will be impossible in a great many cases where, from the character of the defamatory words and the circumstances of publication, it is all but certain that serious harm has resulted in fact." W. Prosser, Law of Torts § 112, p. 765 (4th ed. 1971). [30]

30 "The harm resulting from an injury to reputation is difficult to demonstrate both because it may involve subtle differences in the conduct of the recipients toward the plaintiff and because the recipients, the only witnesses able to establish the necessary causal connection, may be reluctant to testify that the publication affected their relationships with the plaintiff. Thus some presumptions are necessary if the plaintiff is to be adequately compensated." Note, Developments in the Law -- Defamation, 69 Harv. L. Rev. 875, 891-892 (1956).

The Court fears uncontrolled awards of damages by juries, but that not only denigrates the good sense of most jurors -- it fails to consider the role of trial and appellate courts in limiting excessive jury verdicts where no reasonable relationship exists between the amount awarded and the injury sustained. [31] Available information [*395] tends to confirm that American courts have ably discharged this responsibility. [32]

31 "On questions of damages, the judge plays an important role. It is, of course, for him to determine and instruct the jury as to what matters may be taken into consideration by them in arriving at a verdict since such questions are clearly matters of substantive law. But the judge also may and frequently does exercise a judgment as to the amount of damages the plaintiff may recover. His function here is primarily to keep the jury within bounds of reason and common sense, to guard against excessive verdicts dictated by passion and prejudice and to see to it that the amount of the verdict has some reasonable relation to the plaintiff's evidence as to his loss or the probability of loss. Thus, the trial judge may grant a new trial or the appellate court may reverse and remand the case for a new trial because of excessive damages or, as is more frequently the case, a remittitur may be ordered, the effect of which is that the plaintiff must accept a specified reduction of his damages or submit to a new trial on the issue of liability as well as damages." 1 F. Harper & F. James, The Law of Torts § 5.29, p. 467 (1956) (footnote omitted).

32 See Pedrick, *supra*, n. 26, at 587 n. 23.

The new rule with respect to general damages appears to apply to all [***837] libels or slanders, whether defamatory on their face or not, except, I gather, when the plaintiff proves intentional falsehood or reckless disregard. Although the impact of the publication on the victim is the same, in such circumstances the injury to reputation may apparently be presumed in accordance with the traditional rule. Why a defamatory statement is more apt to cause injury if the lie is intentional than when it is only negligent, I fail to understand. I suggest that judges and juries who must live by these rules will find them equally incomprehensible.

B

With a flourish of the pen, the Court also discards the prevailing rule in libel and slander actions that punitive damages may be awarded on the classic grounds of common-law malice, that is, "'[actual] malice' in the sense of ill will or fraud or reckless indifference to consequences." [*396] C. McCormick, Law of Damages § 118, p. 431 (1935); see also W. Prosser, *supra*, § 113, p. 772; 1 A. Hanson, Libel and Related Torts para. 163, p. 133 (1969); Note, Developments in the Law -- Defamation, 69 Harv. L. Rev. 875, 938 (1956); *Cal. Civ. Code § 48a (4)(d)* (1954). In its stead, the Court requires defamation plaintiffs to show intentional falsehood or reckless disregard for the truth or falsity of the publication. The Court again complains about substantial verdicts and the possibility of press self-censorship, saying that punitive damages are merely "private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence." *Ante*, at 350. But I see no constitutional difference between publishing with reckless disregard for the truth, where punitive damages will be permitted, and negligent publication where they will not be allowed. It is difficult to understand what is

constitutionally [**3035] wrong with assessing punitive damages to deter a publisher from departing from those standards of care ordinarily followed in the publishing industry, particularly if common-law malice is also shown.

I note also the questionable premise that "juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused." *Ibid.* This represents an inaccurate view of established practice, "another of those situations in which judges, largely unfamiliar with the relatively rare actions for defamation, rely on words without really going behind them . . . ." [33] While a jury award in any type of civil case may certainly be unpredictable, trial and appellate courts have been increasingly vigilant in ensuring that the jury's result is "based upon a rational consideration of the evidence and the proper application of the [*397] law." *Reynolds v. Pegler, 123 F.Supp. 36, 39 (SDNY 1954)*, aff'd, *223 F.2d 429 (CA2)*, cert. denied, *350 U.S. 846 (1955)*. See *supra*, nn. 31-32. Moreover, some courts require that punitive damages bear a reasonable relation to the compensatory damages award. [34] Still others bar common-law punitive damages or condition their award on a refusal to print a retraction. [35]

"The danger . . . of immoderate [***838] verdicts, is certainly a real one, and the criterion to be applied by the judge in setting or reducing the amount is concededly a vague and subjective one. Nevertheless the verdict may be twice submitted by the complaining defendant to the common sense of trained judicial minds, once on motion for new trial and again on appeal, and it must be a rare instance when an unjustifiable award escapes correction." C. McCormick, *supra*, § 77, p. 278.

33 Murnaghan, *supra*, n. 3, at 29.

34 Note, Developments in the Law -- Defamation, 69 Harv. L. Rev., *supra*, at 875, 938 and n. 443.

35 *Id., at 939, 941-942.* See, *e. g., Cal. Civ. Code § 48a (2)* (1954).

The Court points to absolutely no empirical evidence to substantiate its premise. For my part, I would require something more substantial than an undifferentiated fear of unduly burdensome punitive damages awards before retooling the established common-law rule and depriving the States of the opportunity to experiment with different methods for guarding against abuses.

Even assuming the possibility that some verdicts will be "excessive," I cannot subscribe to the Court's remedy. On its face it is a classic example of judicial overkill. Apparently abandoning the salutary *New York Times* policy of case-by-case "'independent examination of the whole record' . . . so as to assure ourselves that the judgment does not constitute a forbidden intrusion on [*398] the field of free expression," [36] the Court substitutes an inflexible rule barring recovery of punitive damages absent proof of constitutional malice. The *First Amendment* is a majestic statement of a free people's dedication to "uninhibited, robust, and wide-open" debate on public issues, [37] but we do it a grave disservice when we needlessly spend its force. [38] For almost 200 years, punitive damages and the *First Amendment* have peacefully coexisted. There has been no demonstration that state libel laws as they relate to punitive damages necessitate the majority's extreme response. I fear that those who read the Court's decision will find its words inaudible, for the Court speaks "only [with] a voice of power, not of reason. [**3036] " *Mapp v. Ohio, 367 U.S. 643, 686 (1961)* (Harlan, J., dissenting).

36 *376 U.S., at 285.*

37 *Id., at 270.*

38 Judicial review of jury libel awards for excessiveness should be influenced by *First Amendment* considerations, but it makes little sense to discard an otherwise useful and time-tested rule because it might be misapplied in a few cases.

V

In disagreeing with the Court on the *First Amendment's* reach in the area of state libel laws protecting nonpublic persons, I do not repudiate the principle that the *First Amendment* "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society." *Associated Press v. United States, 326 U.S. 1, 20 (1945)*; see also *Miami Herald Publishing Co.* v. *Tornillo, ante*, at 260 (WHITE, J., concurring). I continue to subscribe to the *New York Times* decision and those decisions extending its protection to defamatory falsehoods about public persons. My quarrel with the Court stems [*399] from its willingness "to sacrifice good sense to a syllogism" [39] -- to find in the *New York Times* doctrine an [***839]

infinite elasticity. Unfortunately, this expansion is the latest manifestation of the destructive potential of any good idea carried out to its logical extreme.

39 O. Holmes, The Common Law 36 (1881).

Recovery under common-law standards for defamatory falsehoods about a private individual, who enjoys no "general fame or notoriety in the community," who is not "[pervasively] [involved] in the affairs of society," and who does not "thrust himself into the vortex of [a given] public issue . . . in an attempt to influence its outcome," [40] is simply not forbidden by the *First Amendment*. A distinguished private study group put it this way:

"Accountability, like subjection to law, is not necessarily a net subtraction from liberty." "The *First Amendment* was intended to guarantee free expression, not to create a privileged industry." Commission on Freedom of the Press, A Free and Responsible Press 130, 81 (1947).

40 *Ante*, at 351, 352.

I fail to see how the quality or quantity of public debate will be promoted by further emasculation of state libel laws for the benefit of the news media. [41] If anything, [*400] this trend may provoke a new and radical imbalance in the communications process. Cf. Barron, Access to the Press -- A New *First Amendment* Right, 80 Harv. L. Rev. 1641, 1657 (1967). It is not at all inconceivable that virtually unrestrained defamatory remarks about private citizens will discourage them from speaking out and concerning themselves with social problems. This would turn the *First Amendment* on its head. Note, The Scope of *First Amendment* Protection for Good-Faith Defamatory Error, 75 Yale L. J. 642, 649 (1966); Merin, 11 Wm. & Mary L. Rev., at 418. David Riesman, writing in the midst of World War II on the fascists' effective use of defamatory attacks on their opponents, commented: "Thus it is that the law of libel, with its ecclesiastic background and domestic character, its aura of heart-balm suits and crusading nineteenth-century editors, becomes suddenly important for modern democratic survival." Democracy and Defamation: [**3037] Fair Game and Fair Comment I, 42 Col. L. Rev. 1085, 1088 (1942).

41 Cf. Pedrick, *supra*, n. 26, at 601-602:

> "A great many forces in our society operate to determine the extent to which men are free in fact to express their ideas. Whether there is a privilege for good faith defamatory misstatements on matters of public concern or whether there is strict liability for such statements may not greatly affect the course of public discussion. How different has life been in those states which heretofore followed the majority rule imposing strict liability for misstatements of fact defaming public figures from life in the minority states where the good faith privilege held sway?"
>
> See also T. Emerson, The System of Freedom of Expression 519 (1970) (footnote omitted): "[On] the whole the role of libel law in the system of freedom of expression has been relatively minor and essentially erratic."

This case ultimately comes down to the importance the Court attaches to society's "pervasive and strong interest in preventing and redressing attacks upon reputation." *Rosenblatt v. Baer, 383 U.S., at 86*. From all that I have seen, the Court has miscalculated and denigrates that interest at a time when escalating assaults on individuality and personal dignity counsel otherwise. [42] [*401] At the very least, the issue is highly debatable, [***840] and the Court has not carried its heavy burden of proof to justify tampering with state libel laws. [43]

> 42 "The man who is compelled to live every minute of his life among others and whose every need, thought, desire, fancy or gratification is subject to public scrutiny, has been deprived of his individuality and human dignity. Such an individual merges with the mass. His opinions, being public, tend never to be different; his aspirations, being known, tend always to be conventionally accepted ones; his feelings, being openly exhibited, tend to lose their quality of unique personal warmth and to become the feelings of every man. Such a being, although sentient, is fungible; he is not an individual." Bloustein, Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser, 39 N. Y. U. L. Rev. 962, 1003 (1964).
>
> 43 With the evisceration of the common-law libel remedy for the private citizen, the Court removes from his legal arsenal the most effective weapon to combat assault on personal reputation

by the press establishment. The David and Goliath nature of this relationship is all the more accentuated by the Court's holding today in *Miami Herald Publishing Co.* v. *Tornillo, ante*, p. 241, which I have joined, that an individual criticized by a newspaper's editorial is precluded by the *First Amendment* from requiring that newspaper to print his reply to that attack. While that case involves an announced candidate for public office, the Court's finding of a *First Amendment* barrier to government "intrusion into the function of editors," *ante*, at 258, does not rest on any distinction between private citizens or public officials. In fact, the Court observes that the *First Amendment* clearly protects from governmental restraint "the exercise of editorial control and judgment," *i. e.*, "[the] choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of *public issues and public officials* -- whether fair or unfair . . . ." *Ibid.* (Emphasis added.)

We must, therefore, assume that the hapless ordinary citizen libeled by the press (a) may not enjoin in advance of publication a story about him, regardless of how libelous it may be, *Near v. Minnesota ex rel. Olson, 283 U.S. 697 (1931)*; (b) may not compel the newspaper to print his reply; and (c) may not force the newspaper to print a retraction, because a judicially compelled retraction, like a "remedy such as an enforceable right of access," entails "governmental coercion" as to content, which "at once brings about a confrontation with the express provisions of the *First Amendment* and the judicial gloss on that Amendment developed over the years." *Miami Herald Publishing Co.* v. *Tornillo, ante*, at 254; but cf. this case, *ante*, at 368 n. 3 (BRENNAN, J., dissenting).

My Brother BRENNAN also suggests that there may constitutionally be room for "the possible enactment of statutes, not requiring proof of fault, which provide . . . for publication of a court's determination of falsity if the plaintiff is able to demonstrate that false statements have been published concerning his activities." *Ibid.* The Court, however, does not even consider this less drastic alternative to its new "some fault" libel standards.

[*402] While some risk of exposure "is a concomitant of life in a civilized community," *Time, Inc. v. Hill, 385 U.S. 374, 388 (1967)*, the private citizen does not bargain for defamatory falsehoods. Nor is society powerless to vindicate unfair injury to his reputation.

"It is a fallacy . . . to assume that the *First Amendment* is the only guidepost in the area of state defamation laws. It is not. . . .

"The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being -- a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the [**3038] individual States under the *Ninth* and *Tenth Amendments*. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system." *Rosenblatt v. Baer, supra, at 92* (STEWART, J., concurring).

The case against razing state libel laws is compelling when considered in light of the increasingly prominent role of mass media in our society and the awesome power it has placed in the hands of a select few. [44] Surely, our political "system cannot flourish if regimentation takes hold." *Public Utilities* [***841] *Comm'n v. Pollak, 343 U.S. 451, 469 (1952)* (DOUGLAS, J., dissenting). Nor can it survive if our people are deprived of an effective method [*403] of vindicating their legitimate interest in their good names. [45]

44 See n. 28, *supra*.

45 "No democracy, . . . certainly not the American democracy, will indefinitely tolerate concentrations of private power irresponsible and strong enough to thwart the aspirations of the people. Eventually governmental power will be used to break up private power, or governmental power will be used to regulate private power -- if private power is at once great and irresponsible." Commission on Freedom of the Press, A Free and Responsible Press 80 (1947).

Freedom and human dignity and decency are not antithetical. Indeed, they cannot survive without each other. Both exist side-by-side in precarious balance, one

always threatening to overwhelm the other. Our experience as a Nation testifies to the ability of our democratic institutions to harness this dynamic tension. One of the mechanisms seized upon by the common law to accommodate these forces was the civil libel action tried before a jury of average citizens. And it has essentially fulfilled its role. Not because it is necessarily the best or only answer, but because

"the juristic philosophy of the common law is at bottom the philosophy of pragmatism. Its truth is relative, not absolute. The rule that functions well produces a title deed to recognition." B. Cardozo, Selected Writings 149 (Hall ed. 1947).

In our federal system, there must be room for allowing the States to take diverse approaches to these vexing questions. We should "continue to forbear from fettering the States with an adamant rule which may embarrass them in coping with their own peculiar problems . . . ." *Mapp v. Ohio, 367 U.S., at 681* (Harlan, J., dissenting); see also Murnaghan, From Figment to Fiction to Philosophy -- The Requirement of Proof of Damages in Libel Actions, 22 Cath. U. L. Rev. 1, 38 (1972). [*404] Cf. *Younger v. Harris, 401 U.S. 37, 44-45 (1971)*. Whether or not the course followed by the majority is wise, and I have indicated my doubts that it is, our constitutional scheme compels a proper respect for the role of the States in acquitting their duty to obey the Constitution. Finding no evidence that they have shirked this responsibility, particularly when the law of defamation is even now in transition, I would await some demonstration of the diminution of freedom of expression before acting.

For the foregoing reasons, I would reverse the judgment of the Court of Appeals and reinstate the jury's verdict.

REFERENCES

50 Am Jur 2d, Libel and Slander 125, 297, 299, 302

16 Am Jur Pl & Pr Forms (rev ed), Libel and Slander Forms 1-4, 24

17 Am Jur Trials 223, Libel Actions by Public Officials

US L Ed Digest, Constitutional Law 927.5, 930

ALR Digests, Constitutional Law 794; Libel and Slander 65, 127

L Ed Index to Annos, Libel and Slander

ALR Quick Index, Libel and Slander; New York Times Rule

Federal Quick Index, Libel and Slander

Annotation References:

Constitutional aspects of libel and slander. *28 L Ed 2d 885.*

Libel and slander: what constitutes actual malice, within federal constitutional rule requiring public officials and public figures to show actual malice. 20 ALR3d 988.

Libel and slander: who is a public official or otherwise within the federal constitutional rule requiring public officials to show actual malice. *19 ALR3d 1361.*

Effect of alleged misstatements or misrepresentations in campaign literature, material, or leaflets on validity of representation election. *3 ALR 3d 889.*

Constitutional aspects of libel or slander of public officials. *95 ALR2d 1450.*

Necessity and sufficiency of plaintiff's allegations as to falsity in defamation action. 85 ALR2d 460.

Sufficiency of plaintiff's allegations in defamation action as to defendant's malice. *76 ALR2d 696.*

Libel and slander: actionability of statement imputing incapacity, inefficiency, misconduct, fraud, dishonesty, or the like to public employee. *53 ALR2d 8.*

Excessiveness or inadequacy of damages for defamation. *35 ALR2d 218.*

EXHIBIT B

EXHIBIT B

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MILKOVICH v. LORAIN JOURNAL CO. ET AL.

No. 89-645

SUPREME COURT OF THE UNITED STATES

497 U.S. 1*; *110 S. Ct. 2695*; *111 L. Ed. 2d 1*; *1990 U.S. LEXIS 3296*; *58 U.S.L.W. 4846*; *17 Media L. Rep. 2009

April 24, 1990, Argued
June 21, 1990, Decided

PRIOR HISTORY: CERTIORARI TO THE COURT OF APPEALS OF OHIO, LAKE COUNTY.

DISPOSITION: *46 Ohio App. 3d 20, 545 N. E. 2d 1320*, reversed and remanded.

SYLLABUS

While petitioner Milkovich was a high school wrestling coach, his team was involved in an altercation at a match with another high school's team. Both he and School Superintendent Scott testified at an investigatory hearing before the Ohio High School Athletic Association (OHSAA), which placed the team on probation. They testified again during a suit by several parents, in which a county court overturned OHSAA's ruling. The day after the court's decision, respondent Lorain Journal Company's newspaper published a column authored by respondent Diadiun, which implied that Milkovich lied under oath in the judicial proceeding. Milkovich commenced a defamation action against respondents in the county court, alleging that the column accused him of committing the crime of perjury, damaged him in his occupation of teacher and coach, and constituted libel *per se*. Ultimately, the trial court granted summary judgment for respondents. The Ohio Court of Appeals affirmed, considering itself bound by the State Supreme Court's determination in Superintendent Scott's separate action against respondents that, as a matter of law, the article was constitutionally protected opinion.

Held:

1. The *First Amendment* does not require a separate "opinion" privilege limiting the application of state defamation laws. While the Amendment does limit such application, *New York Times Co. v. Sullivan, 376 U.S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710*, the breathing space that freedoms of expression require to survive is adequately secured by existing constitutional doctrine. Foremost, where a media defendant is involved, a statement on matters of public concern must be provable as false before liability can be assessed, *Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 89 L. Ed. 2d 783, 106 S. Ct. 1558*, thus ensuring full constitutional protection for a statement of opinion having no provably false factual connotation. Next, statements that cannot reasonably be interpreted as stating actual facts about an individual are protected, see, *e. g., Greenbelt Cooperative Publishing Assn., Inc. v. Bresler, 398 U.S. 6, 26 L. Ed. 2d 6, 90 S. Ct. 1537,* thus assuring that public debate will

not suffer for lack of "imaginative expression" or the "rhetorical hyperbole" which has traditionally added much to the discourse of this Nation. The reference to "opinion" in dictum in *Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-340, 41 L. Ed. 2d 789, 94 S. Ct. 2997*, was not intended to create a wholesale defamation exemption for "opinion." Read in context, the *Gertz* dictum is merely a reiteration of Justice Holmes' "marketplace of ideas" concept, see *Abrams v. United States, 250 U.S. 616, 630, 63 L. Ed. 1173, 40 S. Ct. 17*. Simply couching a statement -- "Jones is a liar" -- in terms of opinion -- "In my opinion Jones is a liar" -- does not dispel the factual implications contained in the statement. Pp. 11-21.

2. A reasonable factfinder could conclude that the statements in the Diadiun column imply an assertion that Milkovich perjured himself in a judicial proceeding. The article did not use the sort of loose, figurative, or hyperbolic language that would negate the impression that Diadiun was seriously maintaining Milkovich committed perjury. Nor does the article's general tenor negate this impression. In addition, the connotation that Milkovich committed perjury is sufficiently factual that it is susceptible of being proved true or false by comparing, *inter alia*, his testimony before the OHSAA board with his subsequent testimony before the trial court. Pp. 21-22.

3. This decision balances the *First Amendment's* vital guarantee of free and uninhibited discussion of public issues with the important social values that underlie defamation law and society's pervasive and strong interest in preventing and redressing attacks upon reputation. Pp. 22-23.

COUNSEL: Brent L. English argued the cause for petitioner. With him on the brief was John D. Brown.

Richard D. Panza argued the cause for respondents. With him on the brief were William G. Wickens, David L. Herzer, Richard A. Naegele, P. Cameron DeVore, and Marshall J. Nelson. *

* Briefs of amici curiae urging affirmance were filed for Dow Jones & Co. et al. by Robert D. Sack, Richard J. Tofel, Richard M. Schmidt, Jr., Devereux Chatillon, Douglas P. Jacobs, Barbara L. Wartelle, Harvey L. Lipton, Laura R. Handman, Slade R. Metcalf, Richard J. Ovelmen, Deborah R. Linfield, Jane E. Kirtley, and Bruce W. Sanford; and for the American Civil Liberties Union et al. by Henry R. Kaufman.

Louis A. Colombo and David L. Marburger filed a brief for the Ohio Newspaper Association et al. as amici curiae.

JUDGES: REHNQUIST, C. J., delivered the opinion of the Court, in which WHITE, BLACKMUN, STEVENS, O'CONNOR, SCALIA, and KENNEDY, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, post, p. 23.

OPINION BY: REHNQUIST

OPINION

[*3] [***8] [**2697] CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

[***LEdHR1A] [1A]Respondent J. Theodore Diadiun authored an article in an Ohio newspaper implying that petitioner Michael Milkovich, a local high school wrestling coach, lied under oath [**2698] in a judicial proceeding about an incident involving petitioner and his team which occurred at a wrestling match. Petitioner sued Diadiun and the newspaper for libel, and the Ohio Court of Appeals affirmed a lower court entry of summary judgment against petitioner. This judgment was based in part on the grounds that the article constituted an "opinion" protected from the reach of state defamation law by the *First Amendment to the United States Constitution*. We hold that the *First Amendment* does not prohibit the application of Ohio's libel laws to the alleged defamations contained in the article.

This lawsuit is before us for the third time in an odyssey of litigation spanning nearly 15 years. [1] Petitioner Milkovich, now retired, was the wrestling coach at Maple Heights High [*4] School in Maple Heights, Ohio. In 1974, his team was involved in an altercation at a home wrestling match with a team from Mentor High School. Several people were injured. In response to the incident, the Ohio High School Athletic Association (OHSAA) held a hearing at which Milkovich and H. Don Scott, the Superintendent of Maple Heights Public Schools, testified. Following the hearing, OHSAA placed the Maple Heights team on probation for a year and declared the team ineligible for the 1975 state tournament. OHSAA also censured Milkovich for his actions during the altercation. Thereafter, several parents and wrestlers sued OHSAA in the Court of Common Pleas of Franklin County, Ohio, seeking a restraining order against OHSAA's ruling on the grounds that they

had been denied due process in the OHSAA proceeding. Both Milkovich and Scott testified in that proceeding. The court overturned OHSAA's probation and ineligibility orders on due process grounds.

1 The Court has previously denied certiorari twice in this litigation on various judgments rendered by the Ohio courts. See *Lorain Journal Co. v. Milkovich, 474 U.S. 953, 88 L. Ed. 2d 305, 106 S. Ct. 322 (1985)*; *Lorain Journal Co. v. Milkovich, 449 U.S. 966, 66 L. Ed. 2d 232, 101 S. Ct. 380 (1980)*.

The day after the court rendered its decision, respondent Diadiun's column appeared in the News-Herald, a newspaper which circulates in Lake County, Ohio, and is owned by respondent Lorain Journal Co. The column bore the heading "Maple beat the law with the 'big lie,'" beneath which appeared Diadiun's photograph and the words "TD Says." The carryover page headline announced ". . . Diadiun says Maple told a lie." The column contained the following passages:

"'. . . [A] lesson was learned (or relearned) yesterday by the student body of Maple Heights High [***9] School, and by anyone who attended the Maple-Mentor wrestling meet of last Feb. 8.

"'A lesson which, sadly, in view of the events of the past year, is well they learned early.

"'It is simply this: If you get in a jam, lie your way out.

[*5] "'If you're successful enough, and powerful enough, and can sound sincere enough, you stand an excellent chance of making the lie stand up, regardless of what really happened.

"'The teachers responsible were mainly head Maple wrestling coach, Mike Milkovich, and former superintendent of schools H. Donald Scott.

. . . .

"'Anyone who attended the meet, whether he be from Maple Heights, Mentor, or impartial observer, knows in his heart that Milkovich and Scott lied at the hearing after each having given his solemn oath to tell the truth.

"'But they got away with it.

"'Is that the kind of lesson we want our young people learning from their high school administrators and coaches?

"'I think not.'" *Milkovich v. News-Herald, 46 Ohio App. 3d 20, 21, 545 N.E.2d 1320, 1321-1322 (1989)*. [2]

2 In its entirety, the article reads as follows:

"Yesterday in the Franklin County Common Pleas Court, judge Paul Martin overturned an Ohio High School Athletic Assn. decision to suspend the Maple Heights wrestling team from this year's state tournament.

"It's not final yet -- the judge granted Maple only a temporary injunction against the ruling -- but unless the judge acts much more quickly than he did in this decision (he has been deliberating since a Nov. 8 hearing) the temporary injunction will allow Maple to compete in the tournament and make any further discussion meaningless.

"But there is something much more important involved here than whether Maple was denied due process by the OHSAA, the basis of the temporary injunction.

"When a person takes on a job in a school, whether it be as a teacher, coach, administrator or even maintenance worker, it is well to remember that his primary job is that of educator.

"There is scarcely a person concerned with school who doesn't leave his mark in some way on the young people who pass his way -- many are the lessons taken away from school by students which weren't learned from a lesson plan or out of a book. They come from personal experiences with and observations of their superiors and peers, from watching actions and

reactions.

"Such a lesson was learned (or relearned) yesterday by the student body of Maple Heights High School, and by anyone who attended the Maple-Mentor wrestling meet of last Feb. 8.

"A lesson which, sadly, in view of the events of the past year, is well they learned early.

"It is simply this: If you get in a jam, lie your way out.

"If you're successful enough, and powerful enough, and can sound sincere enough, you stand an excellent chance of making the lie stand up, regardless of what really happened.

"The teachers responsible were mainly head Maple wrestling coach, Mike Milkovich, and former superintendent of schools H. Donald Scott.

"Last winter they were faced with a difficult situation. Milkovich's ranting from the side of the mat and egging the crowd on against the meet official and the opposing team backfired during a meet with Greater Cleveland Conference rival Metor *[sic]*, and resulted in first the Maple Heights team, then many of the partisan crowd attacking the Mentor squad in a brawl which sent four Mentor wrestlers to the hospital.

"Naturally, when Mentor protested to the governing body of high school sports, the OHSAA, the two men were called on the carpet to account for the incident.

"But they declined to walk into the hearing and face up to their responsibilities, as one would hope a coach of Milkovich's accomplishments and reputation would do, and one would certainly expect from a man with the responsible poisition *[sic]* of superintendent of schools.

"Instead they chose to come to the hearing and misrepresent the things that happened to the OHSAA Board of Control, attempting not only to convince the board of their own innocence, but, incredibly, shift the blame of the affair to Mentor.

"I was among the 2,000-plus witnesses of the meet at which the trouble broke out, and I also attended the hearing before the OHSAA, so I was in a unique position of being the only non-involved party to observe both the meet itself and the Milkovich-Scott version presented to the board.

"Any resemblance between the two occurrances *[sic]* is purely coincidental.

"To anyone who was at the meet, it need only be said that the Maple coach's wild gestures during the events leading up to the brawl were passed off by the two as 'shrugs,' and that Milkovich claimed he was 'Powerless to control the crowd' before the melee.

"Fortunately, it seemed at the time, the Milkovich-Scott version of the incident presented to the board of control had enough contradictions and obvious untruths so that the six board members were able to see through it.

"Probably as much in distasteful reaction to the chicanery of the two officials as in displeasure over the actual incident, the board then voted to suspend Maple from this year's tournament and to put Maple Heights, and both Milkovich and his son, Mike Jr. (the Maple Jaycee coach), on two-year probation.

"But unfortunately, by the time the hearing before Judge Martin rolled around, Milkovich and Scott apparently had their version of the incident polished and reconstructed, and the judge apparently believed them.

"'I can say that some of the stories told to the judge sounded pretty darned unfamiliar,' said Dr. Harold Meyer, commissioner of the OHSAA, who attended the hearing. 'It certainly sounded different from what they told us.'

"Nevertheless, the judge bought their story, and ruled in their favor.

"Anyone who attended the meet, whether he be from Maple Heights, Mentor, or impartial observer, knows in his heart that Milkovich and Scott lied at the hearing after each having given his solemn oath to tell the truth.

"But they got away with it.

"Is that the kind of lesson we want our young people learning from their high school administrators and coaches?

"I think not." App. to Pet. for Cert. A138-A139.

[*6] [***10] [**2699] Petitioner commenced a defamation action against respondents in the Court of Common Pleas of Lake County, Ohio, alleging that the headline of Diadiun's article and the [*7] nine passages quoted above "accused plaintiff of committing the crime of perjury, an indictable offense in the State of Ohio, and damaged plaintiff directly in his life-time occupation [**2700] of coach and teacher, and constituted libel per se." App. 12. The action proceeded to trial, and the court granted a directed verdict to respondents on the ground that the evidence failed to establish the article was published with "actual malice" as required by *New York Times Co. v. Sullivan, 376 U.S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710 (1964)*. See App. 21-22. The Ohio Court of Appeals for the Eleventh Appellate District reversed and remanded, holding that there was sufficient evidence of actual malice to go to the jury. See *Milkovich v. Lorain Journal, 65 Ohio App. 2d 143, 416 N.E.2d 662 (1979)*. The Ohio [*8] Supreme Court dismissed the ensuing appeal for want of a substantial constitutional question, and this Court denied certiorari. *449 U.S. 966, 101 S. Ct. 380, 66 L. Ed. 2d 232 (1980)*.

On remand, relying in part on our decision in *Gertz v. Robert Welch, Inc., 418 U.S. 323, 41 L. Ed. 2d 789, 94 S. Ct. 2997 (1974)*, the trial court granted summary judgment to respondents on the grounds that the article was an opinion protected from a libel action by "constitutional law," App. 55, and alternatively, as a public figure, petitioner had failed to [***11] make out a prima facie case of actual malice. *Id., at 55-59*. The Ohio Court of Appeals affirmed both determinations. *Id., at 62-70*. On appeal, the Supreme Court of Ohio reversed and remanded. The court first decided that petitioner was neither a public figure nor a public official under the relevant decisions of this Court. See *Milkovich v. News-Herald, 15 Ohio St. 3d 292, 294-299, 473 N.E.2d 1191, 1193-1196 (1984)*. The court then found that "the statements in issue are factual assertions as a matter of law, and are not constitutionally protected as the opinions of the writer. . . . The plain import of the author's assertions is that Milkovich, *inter alia*, committed the crime of perjury in a court of law." *Id., at 298-299, 473 N.E.2d at 1196-1197*. This Court again denied certiorari. *474 U.S. 953 (1985)*.

Meanwhile, Superintendent Scott had been pursuing a separate defamation action through the Ohio courts. Two years after its *Milkovich* decision, in considering Scott's appeal, the Ohio Supreme Court reversed its position on Diadiun's article, concluding that the column was "constitutionally protected opinion." *Scott v. News-Herald, 25 Ohio St. 3d 243, 254, 496 N.E.2d 699, 709 (1986)*. Consequently, the court upheld a lower court's grant of summary judgment against Scott.

The *Scott* court decided that the proper analysis for determining whether utterances are fact or opinion was set forth in the decision of the United States Court of Appeals for the District of Columbia Circuit in *Ollman v. Evans, 242 U.S. App. D.C. 301, 750 F.2d 970 (1984)*, cert. denied, *471 U.S. 1127,* [*9] *86 L. Ed. 2d 278, 105 S. Ct. 2662 (1985)*. See *Scott, 25 Ohio St. 3d at 250, 496 N.E.2d at 706*. Under that analysis, four factors are considered to ascertain whether, under the "totality of circumstances," a statement is fact or opinion. These factors are: (1) "the specific language used"; (2) "whether the statement is verifiable"; (3) "the general context of the statement"; and (4) "the broader context in which the statement appeared." *Ibid.* The court found that application of the first two factors to the column militated in favor of deeming the challenged passages actionable assertions of fact. *Id., at 250-252, 496 N.E.2d at 706-707*. That potential outcome was trumped, however, by the court's consideration of the third and fourth factors. With respect to the third factor, the general context, the court explained that "the large caption 'TD Says' . . . would indicate to even the most gullible reader that the article was, in fact, opinion." *Id., at 252, 496 N.E.2d at 707*. [3] As for the fourth factor, the "broader context," the court reasoned that because the [**2701] article appeared on a sports page -- "a [***12] traditional haven for cajoling, invective, and hyperbole" -- the article would probably be construed as opinion. *Id., at 253-254, 496 N.E.2d at 708*. [4]

3 The court continued:

"This position is borne out by the second headline on the continuation of the article which states: '. . . *Diadiun says* Maple told a lie.' . . . The issue, in context, was not the statement that there was a legal hearing and Milkovich and Scott lied. Rather, based upon Diadiun's having witnessed

the original altercation and OHSAA hearing, it was his view that any position represented by Milkovich and Scott less than a full admission of culpability was, in his view, a lie. . . . A review of the context of the statements in question demonstrates that Diadiun is not making an attempt to be impartial and no secret is made of his bias. . . . While Diadiun's mind is certainly made up, the average reader viewing the words in their internal context would be hard pressed to accept Diadiun's statements as an impartial reporting of perjury." *Scott, 25 Ohio St. 3d at 252-253, 496 N.E.2d at 707-708* (emphasis in original).

4 Specifically, the court reasoned as follows:

"It is important to recognize that Diadiun's article appeared on the sports page -- a traditional haven for cajoling, invective, and hyperbole. . . . In this broader context we doubt that a reader would assign the same weight to Diadiun's statement as if it had appeared under the byline 'Law Correspondent' on page one of the newspaper. . . . On balance . . . a reader would not expect a sports writer on the sports page to be particularly knowledgeable about procedural due process and perjury. It is our belief that 'legal conclusions' in such a context would probably be construed as the writer's opinion." *Id., at 253-254, 496 N.E.2d at 708.*

[*10] [***LEdHR1B] [1B] [***LEdHR2A] [2A] [***LEdHR3A] [3A] [***LEdHR4A] [4A]Subsequently, considering itself bound by the Ohio Supreme Court's decision in *Scott*, the Ohio Court of Appeals in the instant proceedings affirmed a trial court's grant of summary judgment in favor of respondents, concluding that "it has been decided, as a matter of law, that the article in question was constitutionally protected opinion." *46 Ohio App. 3d at 23, 545 N.E.2d at 1324.*The Supreme Court of Ohio dismissed petitioner's ensuing appeal for want of a substantial constitutional question. App. 119. We granted certiorari, *493 U.S. 1055 (1990)*, to consider the important questions raised by the Ohio courts' recognition of a constitutionally required "opinion" exception to the application of its defamation laws. We now reverse. [5]

5 [***LEdHR2B] [2B]

Preliminarily, respondents contend that our review of the "opinion" question in this case is precluded by the Ohio Supreme Court's decision in *Scott v. News-Herald, 25 Ohio St. 3d 243, 496 N.E.2d 699 (1986)*. First, respondents claim that the determination by the Ohio Supreme Court in *Milkovich v. News-Herald, 15 Ohio St. 3d 292, 298, 473 N.E.2d 1191, 1196 (1984)*, that petitioner is not a public official or figure was overruled in *Scott*. Thus, since petitioner has failed to establish actual malice, his action is precluded under *New York Times Co. v. Sullivan, 376 U.S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710 (1964)*, and *Curtis Publishing Co. v. Butts, 388 U.S. 130, 18 L. Ed. 2d 1094, 87 S. Ct. 1975 (1967)*. This contention is meritless. Respondents rely on the following statements made by the Ohio Supreme Court in its discussion of Scott's status as a public official: "'To say that Milkovich nevertheless was not a public figure for purposes of discussion about the controversy is simply nonsense,'" *25 Ohio St. 3d at 247, 496 N.E.2d at 704* (quoting *Milkovich v. Lorain Journal Co., 474 U.S. 953, 964, 88 L. Ed. 2d 305, 106 S. Ct. 322 (1985)* (BRENNAN, J., dissenting from denial of certiorari)), and "we overrule *Milkovich* in its restrictive view of public officials and hold a public school superintendent is a public official for purposes of defamation law." *25 Ohio St. 3d at 248, 496 N.E.2d at 704*. However, it is clear from the context in which these statements were made that the court was simply supporting its determination that Scott was a public official, and that as relates to petitioner Milkovich, these statements were pure dicta. But more importantly, petitioner Milkovich was not a party to the proceedings in *Scott* and thus would not be bound by anything in that ruling under Ohio law. See *Hainbuchner v. Miner, 31 Ohio St. 3d 133, 137, 509 N.E.2d 424, 427 (1987)* ("It is universally recognized that a former judgment, in order to be *res judicata* in a subsequent action, must have been rendered in an action in which the parties to the subsequent action were adverse parties") (quotation omitted). Since the Ohio Court of Appeals did not address the public-private figure question on remand from the Ohio Supreme Court in *Milkovich* (because it decided against petitioner on the basis of the opinion ruling in *Scott*), the ruling of the Ohio Supreme Court in *Milkovich*

presumably continues to be law of the case on that issue. See *Hawley v. Ritley, 35 Ohio St. 3d 157, 160, 519 N.E.2d 390, 393 (1988)* ("The decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels").

[***LEdHR3B] [3B]

Nor is there any merit to respondents' contention that the Court of Appeals below alternatively decided there was no negligence in this case even if petitioner were regarded as a private figure, and thus the action is precluded by our decision in *Gertz v. Robert Welch, Inc., 418 U.S. 323, 41 L. Ed. 2d 789, 94 S. Ct. 2997 (1974)*. Although the appellate court noted that "the instant cause does not present any material issue of fact as to negligence or 'actual malice,'" *Milkovich v. News-Herald, 46 Ohio App. 3d 20, 24, 545 N.E.2d 1320, 1325 (1989)*, this statement was immediately explained by the court's following statement that the *Scott* ruling on the opinion issue had accorded respondents absolute immunity from liability. See *46 Ohio App. 3d at 24, 545 N.E.2d at 1325*. The court never made an evidentiary determination on the issue of respondents' negligence.

[***LEdHR2C] [2C] [***LEdHR3C] [3C] [***LEdHR4B] [4B]

Next, respondents concede that the *Scott* court relied on the United States Constitution as well as the Ohio Constitution in its recognition of an opinion privilege, Brief for Respondents 18, but argue that certain statements made by the court evidenced an intent to independently rest the decision on state-law grounds, see *25 Ohio St. 3d at 244, 496 N.E.2d at 701* ("We find the article to be an opinion, protected by *Section 11, Article I of the Ohio Constitution . . .*"); *id., at 245, 496 N.E.2d at 702* ("These ideals are not only an integral part of *First Amendment* freedoms under the federal Constitution but are independently reinforced in *Section 11, Article I of the Ohio Constitution . . .*"), thereby precluding federal review under *Michigan v. Long, 463 U.S. 1032, 77 L. Ed. 2d 1201, 103 S. Ct. 3469 (1983)*. We similarly reject this contention. In the *Milkovich* proceedings below, the Court of Appeals relied completely on *Scott* in concluding that Diadiun's article was privileged opinion. See *46 Ohio App. 3d at 23-25, 545 N.E.2d at 1324-1325*. *Scott* relied heavily on federal decisions interpreting the scope of *First Amendment* protection accorded defamation defendants, see, *e. g., 25 Ohio St. 3d at 244, 496 N.E.2d at 701* ("The federal Constitution has been construed to protect published opinions ever since the United States Supreme Court's opinion in *Gertz* v. *Robert Welch, Inc. . . .*"), and concluded that "based upon the totality of circumstances it is our view that Diadiun's article was constitutionally protected opinion both with respect to the federal Constitution and under our state Constitution." *Id., at 254, 496 N.E.2d at 709*. Thus, the *Scott* decision was at least "interwoven with the federal law," and was not clear on its face as to the court's intent to rely on independent state grounds, yet failed to make a "plain statement . . . that the federal cases . . . [did] not themselves compel the result that the court . . . reached." *Long, 463 U.S. at 1040-1041*. Under *Long*, then, federal review is not barred in this case. We note that the Ohio Supreme Court remains free, of course, to address all of the foregoing issues on remand.

[*11] [***13] [**2702] Since the latter half of the 16th century, the common law has afforded a cause of action for damage to a person's reputation by the publication of false and defamatory statements. See L. Eldredge, Law of Defamation 5 (1978).

[*12] In Shakespeare's Othello, Iago says to Othello:

> "Good name in man and woman, dear my lord,
>
> Is the immediate jewel of their souls.
>
> Who steals my purse steals trash;
>
> 'Tis something, nothing;
>
> 'Twas mine, 'tis his, and has been slave to thousands;
>
> But he that filches from me my good name

> Robs me of that which not enriches him,
>
> And makes me poor indeed." Act III, scene 3.

Defamation law developed not only as a means of allowing an individual to vindicate his good name, but also for the purpose of obtaining redress for harm caused by such statements. Eldredge, *supra*, at 5. As the common law developed in this country, apart from the issue of damages, one usually needed only allege an unprivileged publication of false and defamatory matter to state a cause of action for defamation. See, *e. g.*, Restatement [***14] of Torts § 558 (1938); *Gertz* [*13] *v. Robert Welch, Inc., 418 U.S. at 370* (WHITE, J., dissenting) ("Under typical state defamation law, the defamed private citizen had to prove only a false publication that would subject him to hatred, contempt, or ridicule"). The common law generally did not place any additional restrictions on the type of statement that could be actionable. Indeed, defamatory communications were deemed actionable regardless of whether they were deemed to be statements of fact or opinion. See, *e. g.*, Restatement of Torts, *supra*, §§ 565-567. As noted in the 1977 *Restatement (Second) of Torts § 566, Comment a:*

> "Under the law of defamation, an expression of opinion could be defamatory if the [**2703] expression was sufficiently derogatory of another as to cause harm to his reputation, so as to lower him in the estimation of the community or to deter third persons from associating or dealing with him. . . . The expression of opinion was also actionable in a suit for defamation, despite the normal requirement that the communication be false as well as defamatory. . . . This position was maintained even though the truth or falsity of an opinion -- as distinguished from a statement of fact -- is not a matter that can be objectively determined and truth is a complete defense to a suit for defamation."

However, due to concerns that unduly burdensome defamation laws could stifle valuable public debate, the privilege of "fair comment" was incorporated into the common law as an affirmative defense to an action for defamation. "The principle of 'fair comment' afforded legal immunity for the honest expression of opinion on matters of legitimate public interest when based upon a true or privileged statement of fact." 1 F. Harper & F. James, Law of Torts § 5.28, p. 456 (1956) (footnote omitted). As this statement implies, comment was generally privileged when it concerned a matter of public concern, was upon true or privileged facts, represented the actual opinion of the speaker, and was not made [*14] solely for the purpose of causing harm. See Restatement of Torts, *supra*, § 606. "According to the majority rule, the privilege of fair comment applied only to an expression of opinion and not to a false statement of fact, whether it was expressly stated or implied from an expression of opinion." *Restatement (Second) of Torts, supra, § 566, Comment a.* Thus under the common law, the privilege of "fair comment" was the device employed to strike the appropriate balance between the need for vigorous public discourse and the need to redress injury to citizens wrought by invidious or irresponsible speech.

[***LEdHR1C] [1C]In 1964, we decided in *New York Times Co. v. Sullivan, 376 U.S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710*, that the *First Amendment to the United States Constitution* placed limits on the application of the state law of defamation. There the Court recognized the need for "a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' -- that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id., at 279-280.* [***15] This rule was prompted by a concern that, with respect to the criticism of public officials in their conduct of governmental affairs, a state-law "'rule compelling the critic of official conduct to guarantee the truth of all his factual assertions' would deter protected speech." *Gertz v. Robert Welch, Inc., supra, at 334* (quoting *New York Times, supra, at 279*).

Three years later, in *Curtis Publishing Co. v. Butts, 388 U.S. 130, 18 L. Ed. 2d 1094, 87 S. Ct. 1975 (1967)*, a majority of the Court determined "that the *New York Times* test should apply to criticism of 'public figures' as well as 'public officials.' The Court extended the constitutional privilege announced in that case to protect defamatory criticism of nonpublic persons 'who are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large.'"

Gertz, 418 U.S. at 336-337 [*15] (quoting *Butts, 388 U.S. at 164* (Warren, C. J., concurring in result)). As Chief Justice Warren noted in concurrence, "our citizenry has a legitimate and substantial interest in the conduct of such persons, and freedom of the press to engage in uninhibited debate about their involvement in public issues and events is as crucial as it is in the case of 'public officials.'" *Butts, supra, at 164*. The Court has also determined that both for public officials and public figures, a showing of *New York Times* malice is subject to a clear and convincing standard [**2704] of proof. *Gertz, 418 U.S. at 342*.

The next step in this constitutional evolution was the Court's consideration of a private individual's defamation actions involving statements of public concern. Although the issue was intially in doubt, see *Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 29 L. Ed. 2d 296, 91 S. Ct. 1811 (1971)*, the Court ultimately concluded that the *New York Times* malice standard was inappropriate for a private person attempting to prove he was defamed on matters of public interest. *Gertz v. Robert Welch, Inc., supra.* As we explained:

> "Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy.
>
> . . . .
>
> "[More important,] public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them. No such assumption is justified with respect to a private individual." *418 U.S. at 344-345* (footnote omitted).

Nonetheless, the Court believed that certain significant constitutional protections were warranted in this area. First, we held that the States could not impose liability without requiring some showing of fault. See *id., at 347-348* ("This approach . . . recognizes the strength of the legitimate state interest in compensating private individuals for wrongful injury [*16] to reputation, [***16] yet shields the press and broadcast media from the rigors of strict liability for defamation"). Second, we held that the States could not permit recovery of presumed or punitive damages on less than a showing of *New York Times* malice. See *418 U.S. at 350* ("Like the doctrine of presumed damages, jury discretion to award punitive damages unnecessarily exacerbates the danger of media self-censorship . . .").

Still later, in *Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 89 L. Ed. 2d 783, 106 S. Ct. 1558 (1986)*, we held that "the common-law presumption that defamatory speech is false cannot stand when a plaintiff seeks damages against a media defendant for speech of public concern." *Id., at 777*. In other words, the Court fashioned "a constitutional requirement that the plaintiff bear the burden of showing falsity, as well as fault, before recovering damages." *Id., at 776*. Although recognizing that "requiring the plaintiff to show falsity will insulate from liability some speech that is false, but unprovably so," the Court believed that this result was justified on the grounds that "placement by state law of the burden of proving truth upon media defendants who publish speech of public concern deters such speech because of the fear that liability will unjustifiably result." *Id., at 777-778*.

We have also recognized constitutional limits on the *type* of speech which may be the subject of state defamation actions. In *Greenbelt Cooperative Publishing Assn., Inc. v. Bresler, 398 U.S. 6, 26 L. Ed. 2d 6, 90 S. Ct. 1537 (1970)*, a real estate developer had engaged in negotiations with a local city council for a zoning variance on certain of his land, while simultaneously negotiating with the city on other land the city wished to purchase from him. A local newspaper published certain articles stating that some people had characterized the developer's negotiating position as "blackmail," and the developer sued for libel. Rejecting a contention that liability could be premised on the notion that the word "blackmail" implied the developer had committed the actual crime of blackmail, we held that "the imposition of [*17] liability on such a basis was constitutionally impermissible -- that as a matter of constitutional law, the word 'blackmail' in these circumstances was not slander when spoken, and not libel when reported in the Greenbelt News Review." *Id., at 13*. [**2705] Noting that the published reports "were accurate and full," the Court reasoned that "even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who

considered [the developer's] negotiating position extremely unreasonable." *Id., at 13-14.* See also *Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 50, 99 L. Ed. 2d 41, 108 S. Ct. 876 (1988)* (*First Amendment* precluded recovery under state emotional distress action for ad parody which "could not reasonably have been interpreted as stating actual facts about the public figure involved"); *Letter Carriers v. Austin, 418 U.S. 264, 284-286, 94 S. Ct. 2770, 41 L. Ed. 2d 745 (1974)* (use of the word "traitor" in literary definition of a union "scab" not basis for a defamation [***17] action under federal labor law since used "in a loose, figurative sense" and was "merely rhetorical hyperbole, a lusty and imaginative expression of the contempt felt by union members").

[***LEdHR1D] [1D] [***LEdHR5] [5]The Court has also determined that "in cases raising *First Amendment* issues . . . an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" *Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 499, 80 L. Ed. 2d 502, 104 S. Ct. 1949 (1984)* (quoting *New York Times, 376 U.S. at 284-286*)."The question whether the evidence in the record in a defamation case is sufficient to support a finding of actual malice is a question of law." *Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 685, 105 L. Ed. 2d 562, 109 S. Ct. 2678 (1989).*

[***LEdHR1E] [1E]Respondents would have us recognize, in addition to the established safeguards discussed above, still another First-Amendment-based protection for defamatory statements which are categorized as "opinion" as opposed to "fact." For [*18] this proposition they rely principally on the following dictum from our opinion in *Gertz:*

> "Under the *First Amendment* there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact." *418 U.S. at 339-340* (footnote omitted).

Judge Friendly appropriately observed that this passage "has become the opening salvo in all arguments for protection from defamation actions on the ground of opinion, even though the case did not remotely concern the question." *Cianci v. New Times Publishing Co., 639 F.2d 54, 61 (CA2 1980).* Read in context, though, the fair meaning of the passage is to equate the word "opinion" in the second sentence with the word "idea" in the first sentence. Under this view, the language was merely a reiteration of Justice Holmes' classic "marketplace of ideas" concept. See *Abrams v. United States, 250 U.S. 616, 630, 63 L. Ed. 1173, 40 S. Ct. 17 (1919)* (dissenting opinion) ("The ultimate good desired is better reached by free trade in ideas -- . . . the best test of truth is the power of the thought to get itself accepted in the competition of the market").

Thus, we do not think this passage from *Gertz* was intended to create a wholesale defamation exemption for anything that might be labeled "opinion." See *Cianci, supra, at 62, n.10* (The "marketplace of ideas" origin of this passage "points strongly to the view that the 'opinions' held to be constitutionally protected were the sort of thing that could be corrected by discussion"). Not only would such an interpretation be contrary to the tenor and context of the passage, but it would also ignore the fact that expressions of "opinion" may often imply an assertion of objective fact.

If a speaker says, "In my opinion John Jones is a liar," he implies a knowledge of [**2706] facts which lead to the [***18] conclusion that Jones told an untruth. Even if the speaker states the facts [*19] upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact. Simply couching such statements in terms of opinion does not dispel these implications; and the statement, "In my opinion Jones is a liar," can cause as much damage to reputation as the statement, "Jones is a liar." As Judge Friendly aptly stated: "[It] would be destructive of the law of libel if a writer could escape liability for accusations of [defamatory conduct] simply by using, explicitly or implicitly, the words 'I think.'" See *Cianci, supra, at 64.* It is worthy of note that at common law, even the privilege of fair comment did not extend to "a false statement of fact, whether it was expressly stated or implied from an expression of opinion." *Restatement (Second) of Torts, § 566, Comment a* (1977).

Apart from their reliance on the *Gertz* dictum, respondents do not really contend that a statement such

as, "In my opinion John Jones is a liar," should be protected by a separate privilege for "opinion" under the *First Amendment*. But they do contend that in every defamation case the *First Amendment* mandates an inquiry into whether a statement is "opinion" or "fact," and that only the latter statements may be actionable. They propose that a number of factors developed by the lower courts (in what we hold was a mistaken reliance on the *Gertz* dictum) be considered in deciding which is which. But we think the "'breathing space'" which "'freedoms of expression require in order to survive,'" *Hepps, 475 U.S. at 772* (quoting *New York Times, 376 U.S. at 272*), is adequately secured by existing constitutional doctrine without the creation of an artificial dichotomy between "opinion" and fact.

[***LEdHR1F] [1F] [***LEdHR6] [6] [***LEdHR7A] [7A]Foremost, we think *Hepps* stands for the proposition that a statement on matters of public concern must be provable as false before there can be liability under state defamation law, at least in situations, like the present, where a media defendant [*20] is involved. [6] Thus, unlike the statement, "In my opinion Mayor Jones is a liar," the statement, "In my opinion Mayor Jones shows his abysmal ignorance by accepting the teachings of Marx and Lenin," would not be actionable. *Hepps* ensures that a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection. [7]

6 In *Hepps* the Court reserved judgment on cases involving nonmedia defendants, see *475 U.S. at 779, n.4*, and accordingly we do the same. Prior to *Hepps*, of course, where public-official or public-figure plaintiffs were involved, the *New York Times* rule already required a showing of falsity before liability could result. *475 U.S. at 775*.

7 [***LEdHR7B] [7B]

We note that the issue of falsity relates to the *defamatory* facts implied by a statement. For instance, the statement, "I think Jones lied," may be provable as false on two levels. First, that the speaker really did not think Jones had lied but said it anyway, and second that Jones really had not lied. It is, of course, the second level of falsity which would ordinarily serve as the basis for a defamation action, though falsity at the first level may serve to establish malice where that is required for recovery.

[***19] [***LEdHR1G] [1G]Next, the *Bresler-Letter Carriers-Falwell* line of cases provides protection for statements that cannot "reasonably [be] interpreted as stating actual facts" about an individual. *Falwell, 485 U.S. at 50*. This provides assurance that public debate will not suffer for lack of "imaginative expression" or the "rhetorical hyperbole" which has traditionally added much to the discourse of our Nation. See *id., at 53-55*.

[***LEdHR1H] [1H]The *New York Times-Butts-Gertz* culpability requirements further ensure that debate on public issues remains "uninhibited, robust, and wide-open." *New York Times, 376 U.S. at 270*.Thus, where a statement of "opinion" on a matter [**2707] of public concern reasonably implies false and defamatory facts regarding public figures or officials, those individuals must show that such statements were made with knowledge of their false implications or with reckless disregard of their truth. Similarly, where such a statement involves a private figure on a matter of public concern, a plaintiff must show that the false connotations were made with some level of fault [*21] as required by *Gertz*. [8] Finally, the enhanced appellate review required by *Bose Corp.* provides assurance that the foregoing determinations will be made in a manner so as not to "constitute a forbidden intrusion of the field of free expression." *Bose Corp., 466 U.S. at 499* (quotation omitted).

8 [***LEdHR1I] [1I]

Of course, the limitations on presumed or punitive damages established by *New York Times* and *Gertz* also apply to the type of statements at issue here.

We are not persuaded that, in addition to these protections, an additional separate constitutional privilege for "opinion" is required to ensure the freedom of expression guaranteed by the *First Amendment*. The dispositive question in the present case then becomes whether a reasonable factfinder could conclude that the statements in the Diadiun column imply an assertion that petitioner Milkovich perjured himself in a judicial proceeding. We think this question must be answered in the affirmative. As the Ohio Supreme Court itself

observed: "The clear impact in some nine sentences and a caption is that [Milkovich] 'lied at the hearing after . . . having given his solemn oath to tell the truth.'" *Scott, 25 Ohio St. 3d at 251, 496 N.E.2d at 707.* This is not the sort of loose, figurative, or hyperbolic language which would negate the impression that the writer was seriously maintaining that petitioner committed the crime of perjury. Nor does the general tenor of the article negate this impression.

We also think the connotation that petitioner committed perjury is sufficiently factual to be susceptible of being proved true or false. A determination whether petitioner lied in this instance can be made on a core of objective evidence by comparing, *inter alia*, petitioner's testimony before the OHSAA board with his subsequent testimony before the trial court. As the *Scott* court noted regarding the plaintiff in that case: "Whether or not H. Don Scott did indeed perjure himself is certainly verifiable by a perjury action with evidence adduced from the transcripts and witnesses present at [*22] the [***20] hearing. Unlike a subjective assertion the averred defamatory language is an articulation of an objectively verifiable event." *Id., at 252, 496 N.E.2d at 707.* So too with petitioner Milkovich. [9]

> 9 In their brief, *amici* Dow Jones et al. urge us to view the disputed statements "against the background of a high profile controversy in a small community," and says that "they related to a matter of pressing public concern in a small town." Brief for Dow Jones et al. as *Amici Curiae* 27. We do not have the same certainty as do *amici* that people in a "small town" view statements such as these differently from people in a large city. Be that as it may, however, *amici* err in their factual assumption. Maple Heights is located in Cuyahoga County, Ohio, and in the 1980 census had a population of 29,735. Mentor is located in Lake County, Ohio, and in the 1980 census had a population of 42,065. Lake County adjoins Cuyahoga County on the east, and in the 1980 census had a population of 212,801. Both Maple Heights and Mentor are included in the Cleveland standard consolidated statistical area, which in 1980 had a population of 2,834,062. The high schools of both Mentor and Maple Heights played in the Greater Cleveland Conference.

The numerous decisions discussed above establishing *First Amendment* protection for defendants in defamation actions surely demonstrate the Court's recognition of the Amendment's vital guarantee of free and uninhibited discussion of public issues. But there is also another side to the equation; we have regularly acknowledged the "important social values which underlie the law of defamation," and recognized that "society has a pervasive and strong interest in preventing and redressing attacks upon reputation." *Rosenblatt v. Baer, 383 U.S. 75, 86, 15 L. Ed. 2d 597, 86 S. Ct. 669* [**2708] *(1966).* Justice Stewart in that case put it with his customary clarity:

> "The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being -- a concept at the root of any decent system of ordered liberty.
>
> . . . .
>
> "The destruction that defamatory falsehood can bring is, to be sure, often beyond the capacity of the law to redeem. [*23] Yet, imperfect though it is, an action for damages is the only hope for vindication or redress the law gives to a man whose reputation has been falsely dishonored." *383 U.S. at 92-93* (concurring opinion).

[***LEdHR1J] [1J]We believe our decision in the present case holds the balance true. The judgment of the Ohio Court of Appeals is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

Reversed.

DISSENT BY: BRENNAN

DISSENT

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

Since this Court first hinted that the *First Amendment* provides some manner of protection for statements of opinion, [1] notwithstanding any

common-law protection, courts and commentators have struggled with [***21] the contours of this protection and its relationship to other doctrines within our *First Amendment* jurisprudence. Today, for the first time, the Court addresses this question directly and, to my mind, does so cogently and almost entirely correctly. I agree with the Court that under our line of cases culminating in *Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 777, 89 L. Ed. 2d 783, 106 S. Ct. 1558 (1986)*, only defamatory statements that are capable of being proved false are subject to liability under state libel law. See 497 U.S. at 16. [2] I also agree with the Court that the "statement" [*24] that the plaintiff must prove false under *Hepps* is not invariably the literal phrase published but rather what a reasonable reader would have understood the author to have said. See 497 U.S. at 16-17 (discussing *Greenbelt Cooperative Publishing Assn., Inc. v. Bresler, 398 U.S. 6, 26 L. Ed. 2d 6, 90 S. Ct. 1537 (1970)*; *Letter Carriers v. Austin, 418 U.S. 264, 94 S. Ct. 2770, 41 L. Ed. 2d 745 (1974)*; *Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 99 L. Ed. 2d 41, 108 S. Ct. 876 (1988))*.

1 See, *e. g., New York Times Co. v. Sullivan, 376 U.S. 254, 292, n.30, 11 L. Ed. 2d 686, 84 S. Ct. 710 (1964)* ("Since the *Fourteenth Amendment* requires recognition of the conditional privilege for honest misstatements of fact, it follows that a defense of fair comment must be afforded for honest expression of opinion based upon privileged, as well as true, statements of fact"); *Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-340, 41 L. Ed. 2d 789, 94 S. Ct. 2997 (1974)* ("Under the *First Amendment* there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas").

2 The defendant in the *Hepps* case was a major daily newspaper and, as the majority notes, see 497 U.S. at 16, the Court declined to decide whether the rule it applied to the newspaper would also apply to a nonmedia defendant. See *475 U.S. at 779, n.4*. I continue to believe that "such a distinction is 'irreconcilable with the fundamental *First Amendment* principle that "the inherent worth of . . . speech in terms of its capacity for informing the public does not depend upon the identity of the source, whether corporation, association, union, or individual.'" *Id., at 780* (BRENNAN, J., concurring) (citations omitted).

In other words, while the Court today dispels any misimpression that there is a so-called opinion privilege *wholly in addition* to the protections we have already found to be guaranteed by the *First Amendment*, it determines that a protection for statements of pure opinion is dictated by *existing First Amendment* doctrine. As the Court explains, "full constitutional protection" extends to any statement relating to matters of public concern "that cannot 'reasonably [be] interpreted as stating actual facts' about an individual." [**2709] 497 U.S. at 20. Among the circumstances to be scrutinized by a court in ascertaining whether a statement purports to state or imply "actual facts about an individual," as shown by the Court's analysis of the statements at issue here, see *ante*, at 22, and n.9, are the same indicia that lower courts have been relying on for the past decade or so to distinguish between statements of fact and statements of opinion: the type of language used, the meaning of the statement in context, whether the statement is verifiable, and the broader social circumstances in which the statement was made. See, *e. g., Potomac Valve & Fitting Inc. v. Crawford Fitting Co., 829 F.2d 1280 (CA4 1987)*; *Janklow v. Newsweek, Inc., 788 F.2d 1300 (CA8 1986)*; *Ollman v. Evans, 242 U.S. App. D.C. 301, 750 F.2d 970 (1984)*, cert. denied, *471 U.S. 1127, 86 L. Ed. 2d 278, 105 S. Ct. 2662* [***22] *(1985)*.

[*25] With all of the above, I am essentially in agreement. I part company with the Court at the point where it applies these general rules to the statements at issue in this case because I find that the challenged statements cannot reasonably be interpreted as either stating or implying defamatory facts about petitioner. Under the rule articulated in the majority opinion, therefore, the statements are due "full constitutional protection." I respectfully dissent.

I

As the majority recognizes, the kind of language used and the context in which it is used may signal readers that an author is not purporting to state or imply actual, known facts. In such cases, this Court has rejected claims to the contrary and found that liability may not attach "as a matter of constitutional law." 497 U.S. at 17. See, *e. g., Bresler, supra* (metaphor); *Letter Carriers, supra* (hyperbole); *Falwell, supra* (parody). In *Bresler,*

for example, we found that Bresler could not recover for being accused of "blackmail" because the readers of the article would have understood the author to mean only that Bresler was manipulative and extremely unreasonable. See *ante*, at 16-17. In *Letter Carriers*, we found that plaintiffs could not recover for being accused of being "traitor[s]" because the newsletter's readers would have understood that the author meant that plaintiffs' accurately reported actions were reprehensible and destructive to the social fabric, not that plaintiffs committed treason. See *ante*, at 17.

Statements of belief or opinion are like hyperbole, as the majority agrees, in that they are not understood as actual assertions of fact about an individual, but they may be actionable if they *imply* the existence of false and defamatory facts. See *ante*, at 18-19. The majority provides some general guidance for identifying when statements of opinion imply assertions of fact. But it is a matter worthy of further attention [*26] in order "to confine the perimeters of [an] unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited." *Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 505, 80 L. Ed. 2d 502, 104 S. Ct. 1949 (1984)*. Although statements of opinion *may* imply an assertion of a false and defamatory fact, they do not *invariably* do so. Distinguishing which statements do imply an assertion of a false and defamatory fact requires the same solicitous and thorough evaluation that this Court has engaged in when determining whether particular exaggerated or satirical statements could reasonably be understood to have asserted such facts. See *Bresler, supra; Letter Carriers, supra; Falwell, supra.* As Justice Holmes observed long ago: "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." *Towne v. Eisner, 245 U.S. 418, 425, 62 L. Ed. 372, 38 S. Ct. 158 (1918).*

For instance, the statement that "Jones is a liar," or the example [***23] given by the majority, "In my opinion John Jones is a liar" -- standing [**2710] alone -- can reasonably be interpreted as implying that there are facts known to the speaker to cause him to form such an opinion. See 497 U.S. at 18-19. But a different result must obtain if the speaker's comments had instead been as follows: "Jones' brother once lied to me; Jones just told me he was 25; I've never met Jones before and I don't actually know how old he is or anything else about him, but he looks 16; I think Jones lied about his age just now." In the latter case, there are at least six statements, two of which may arguably be actionable. The first such statement is factual and defamatory and may support a defamation action by Jones' brother. The second statement, however, that "I think Jones lied about his age just now," can be reasonably interpreted in context only as a statement that the speaker infers, from the facts stated, that Jones told a particular lie. It is clear to the listener that the speaker does [*27] not actually know whether Jones lied and does not have any other reasons for thinking he did. [3] Thus, the only fact implied by the second statement is that the speaker drew this inference. If the inference is sincere or nondefamatory, the speaker is not liable for damages. [4]

3 The *Restatement (Second) of Torts § 566, Comment c* (1977), makes a similar observation. It explains that a statement that "I think C must be an alcoholic" is potentially libelous because a jury might find that it implies the speaker knew undisclosed facts to justify the statement. In contrast, it finds that the following statement could not be found to imply any defamatory facts:

"A writes to B about his neighbor C: 'He moved in six months ago. He works downtown, and I have seen him during that time only twice, in his backyard around 5:30 seated in a deck chair with a portable radio listening to a news broadcast, and with a drink in his hand. I think he must be an alcoholic.'"

Yet even though clear disclosure of a comment's factual predicate precludes a finding that the comment implies other defamatory facts, this does not signify that a statement, preceded by only a partial factual predicate or none at all, necessarily implies other facts. The operative question remains whether reasonable readers would have actually interpreted the statement as implying defamatory facts. See *ante*, at 20, n.7; see generally Note, 13 Wm. Mitchell L. Rev. 545 (1987); Comment, *74 Calif. L. Rev. 1001 (1986)*; Zimmerman, Curbing the High Price of Loose Talk, 18 U. C. D. L. Rev. 359 (1985).

4 See 497 U.S. at 20, n.7 (noting that under *Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 89 L. Ed. 2d 783, 106 S. Ct. 1558 (1986)*,

"the issue of falsity relates to the defamatory facts *implied* by a statement" (emphasis changed)). *Hepps* mandates protection for speech that does not actually state or imply false and defamatory facts -- independently of the *Bresler-Letter Carriers-Falwell* line of cases. Implicit in the constitutional rule that a plaintiff must prove a statement false to recover damages is a requirement to determine first what statement was actually made. The proof that *Hepps* requires from the plaintiff hinges on what the statement can reasonably be interpreted to mean. For instance, if Riley tells his friends that Smith cheats at cards and Smith then proves that he did not rob a convenience store, Smith cannot recover damages for libel on that basis because he has proved the wrong assertion false. Likewise, in the example in text, Jones cannot recover for defamation for the statement "I think Jones lied about his age just now" by producing proof that he did not lie about his age because, like Smith, he would have proved the wrong assertion false. The assertion Jones must prove false is that the speaker had, in fact, drawn the inference that Jones lied.

[*28] II

The majority does not rest its decision today on any finding that the statements at issue explicitly state a false and defamatory fact. Nor could it. Diadiun's assumption that Milkovich must have lied at the court [***24] hearing is patently conjecture. [5] The majority finds Diadiun's statements actionable, however, because it concludes that these statements imply a factual assertion that Milkovich perjured himself at the judicial proceeding. [**2711] I disagree. Diadiun not only reveals the facts upon which he is relying but he makes it clear at which point he runs out of facts and is simply guessing. Read in context, the statements cannot reasonably be interpreted as implying such an assertion as fact. See 497 U.S. at 5-7, n.2 (reproducing the column).

5 Conjecture, when recognizable as such, alerts the audience that the statement is one of belief, not fact. The audience understands that the speaker is merely putting forward a hypothesis. Although the hypothesis involves a factual question, it is understood as the author's "best guess." Of course, if the speculative conclusion is preceded by stated factual premises, and one or more of them is false and defamatory, an action for libel may lie *as to them*. But the speculative conclusion itself is actionable only if it implies the existence of another false and defamatory fact.

Diadiun begins the column by noting that, on the day before, a Court of Common Pleas had overturned the decision by the Ohio High School Athletic Association (OHSAA) to suspend the Maple Heights wrestling team from that year's state tournament. He adds that the reversal was based on due process grounds. Diadiun emphasizes to the audience that he was present at the wrestling meet where the brawl that led to the team's suspension took place and that he was present at the hearing before the OHSAA. He attributes the brawl to Maple Heights coach Milkovich's wild gestures, ranting and egging the crowd on against the competing team from Mentor. He then describes Milkovich's testimony before the OHSAA, characterizing it as deliberate misrepresentation [*29] "attempting not only to convince the board of [his] own innocence, but, incredibly, shift the blame of the affair to Mentor." *Ante*, at 6, n.2. Diadiun then quotes statements allegedly made by Milkovich to the commissioners to the effect that his wrestlers had not been involved in the fight and his gestures had been mere shrugs.

At that point in the article, the author openly begins to surmise. Diadiun says that it "*seemed* " that Milkovich's and another official's story contained enough contradictions and obvious untruths that the OHSAA board was able to see through it and that "*probably*" the OHSAA's suspension of the Maple Heights team reflected displeasure as much at the testimony as at the melee. *Ante*, at 7, n.2 (emphasis added). Then Diadiun guesses that by the time of the court hearing, the two officials "*apparently* had their version of the incident polished and reconstructed, and the judge *apparently* believed them." *Ibid.* (emphasis added). For the first time, the column quotes a third party's version of events. The source, an OHSAA commissioner, is described -- in evident contrast to Diadiun -- as having attended the proceeding. The column does not quote any testimony from the court proceeding, nor does it describe what Milkovich said in court. There is only a vague statement from the OHSAA commissioner that the testimony "sounded pretty darned unfamiliar." [6] For the first time, Diadiun [***25] fails [*30] to claim any firsthand knowledge, after stressing that he had personally attended

both the meet and the OHSAA hearing. After noting again that the judge ruled in Milkovich's and Maple Heights' favor, Diadiun proclaims: "Anyone who attended the meet, whether he be from Maple Heights, Mentor, or impartial observer, knows in his heart that Milkovich and Scott lied at the hearing after each having given his solemn oath to tell the truth." *Ibid.*

> 6 The commissioner is quoted as having said: "'I can say that some of the stories told to the judge sounded pretty darned unfamiliar . . . . It certainly sounded different from what they told us.'" *Ante*, at 7, n.2. This quotation might also be regarded as a stated factual premise on which Diadiun's speculation is based. However, Milkovich did not complain of the quotation in his pleadings. In any event, it is unlikely that it would be found defamatory. Diadiun had already characterized the testimony of the two officials before the OHSAA as "obvious untruths." Thus, the commissioner's alleged assertion that the testimony in court was different is quite nebulous. It might indicate that the officials told the truth in court, in contrast to the version given to the commissioners, or that the officials discussed entirely different issues, rather than that they told a new lie.

No reasonable reader could understand Diadiun to be impliedly asserting -- as fact -- that Milkovich had perjured himself. Nor could such a reader infer that Diadiun had further information about Milkovich's court testimony on which his belief was based. It is plain from the column that Diadiun did not attend the court hearing. Diadiun also clearly had no detailed secondhand information about what Milkovich had said in court. Instead, [**2712] what suffices for "detail" and "color" are quotations from the OHSAA hearing -- old news compared to the court decision which prompted the column -- and a vague quotation from an OHSAA commissioner. Readers could see that Diadiun was focused on the court's reversal of the OHSAA's decision and was angrily supposing what must have led to it. [7]

> 7 Both state and federal courts have found that audiences can recognize conjecture that neither states nor implies any assertions of fact, just as they can recognize hyperbole. For example, in *Potomac Valve & Fitting Inc. v. Crawford Fitting Co., 829 F.2d 1280, 1290 (CA4 1987)*, the court found that a disparaging statement about a product test in an industry newsletter, set forth following a list of seven observations about the test's methodology, "readily appears to be nothing more than the author's personal inference from the test results. The premises are explicit, and the reader is by no means required to share [the author's] conclusion." For the same reason, the court in *Dunlap v. Wayne, 105 Wash. 2d 529, 540, 716 P.2d 842, 849 (1986)*, concluded: "Arguments for actionability disappear when the audience members know the facts underlying an assertion and can judge the truthfulness of the allegedly defamatory statement themselves." See also *National Assn. of Government Employees, Inc. v. Central Broadcasting Corp., 379 Mass. 220, 226, 396 N.E.2d 996, 1000 (1979)* (finding that, as listeners were told the facts upon which a radio talk show host based her conclusion, they "could make up their own minds and generate their own opinions or ideas which might or might not accord with [the host's]").
>
> The common-law doctrine of fair comment was also premised on such an observation. Where the reader knew or was told the factual foundation for a comment and could therefore independently judge whether the comment was reasonable, a defendant's unreasonable comment was held to defame "'himself rather than the subject of his remarks.'" Hill, Defamation and Privacy Under the *First Amendment*, 76 Colum. L. Rev. 1205, 1229 (1976) (quoting *Popham* v. *Pickburn*, 7 H. & N. 891, 898, 158 Eng. Rep. 730, 733 (Ex. 1862) (Wilde, B.)). "As Thomas Jefferson observed in his first Inaugural Address . . . error of opinion need not and ought not be corrected by the courts 'where reason is left free to combat it.'" *Potomac, 829 F.2d at 1288-1289*, quoting Thomas Jefferson's first Inaugural Address (The Complete Jefferson 385 (S. Padover ed. 1943)).

[*31] Even the insinuation that Milkovich had repeated, in court, a more plausible version of the misrepresentations [***26] he had made at the OHSAA hearing is preceded by the cautionary term "apparently" -- an unmistakable sign that Diadiun did not know what Milkovich had actually said in court. "Cautionary language or interrogatories of this type put the reader on notice that what is being read is opinion and thus weaken any inference that the author possesses knowledge of

damaging, undisclosed facts. . . . In a word, when the reasonable reader encounters cautionary language, he tends to 'discount that which follows.'" *Ollman v. Evans, 242 U.S. App. D.C. at 314, 750 F.2d at 983*, quoting *Burns v. McGraw-Hill Broadcasting Co., 659 P.2d 1351, 1360 (Colo. 1983)*. See also B. Sanford, Libel and Privacy: The Prevention and Defense of Litigation 145 (1987) (explaining that many courts have found that words like "apparent" reveal "that the assertion is qualified or speculative and is not to be understood as a declaration of fact"); *Information Control Corp. v. Genesis One Computer Corp., 611 F.2d 781, 784 (CA9 1980)* (explaining that a statement phrased in language of apparency "is less likely to be understood as a statement of [*32] fact rather than as a statement of opinion"); *Gregory v. McDonnell Douglas Corp., 17 Cal. 3d 596, 603, 552 P.2d 425, 429, 131 Cal. Rptr. 641 (1976)* (finding a letter "cautiously phrased in terms of apparency" did not imply factual assertions); *Stewart v. Chicago Title Ins. Co., 151 Ill. App. 3d 888, 894, 503 N.E.2d 580, 583, 104 Ill. Dec. 865 (1987)* (finding a letter "couched in language of opinion rather than firsthand knowledge" did not imply factual assertions). Thus, it is evident from what Diadiun actually wrote that he had no unstated reasons for concluding that Milkovich perjured himself.

Furthermore, the tone and format of the piece notify readers to expect speculation and personal judgment. The tone is pointed, exaggerated, and heavily laden with emotional rhetoric and moral outrage. Diadiun never says, for instance, that Milkovich committed perjury. He says that "anyone who [**2713] attended the meet . . . knows in his heart" that Milkovich lied -- obvious hyperbole as Diadiun does not purport to have researched what everyone who attended the meet knows in his heart.

The format of the piece is a signed editorial column with a photograph of the columnist and the logo "TD Says." Even the headline on the page where the column is continued -- "Diadiun says Maple told a lie," 497 U.S. at 4 -- reminds readers that they are reading one man's commentary. While signed columns may certainly include statements of fact, they are also the "well recognized home of opinion and comment." *Mr. Chow of New York v. Ste. Jour Azur S. A., 759 F.2d 219, 227 (CA2 1985)*. Certain formats -- editorials, reviews, political cartoons, letters to the editor -- signal the reader to anticipate a departure from what is actually known by the author as fact. See *Ollman v. Evans, supra, at 317, 750 F.2d at 986* ("The reasonable reader who peruses [a] column on the editorial or Op-Ed page is fully aware that the statements found there are not 'hard' news like those printed on the front page or elsewhere in the news sections of the newspaper"); R. Smolla, Law of Defamation § 6.12(4), n.252 (1990) (collecting [*33] cases); Zimmerman, Curbing the High Price of Loose Talk, 18 U. C. D. L. Rev. 359, 442 (1985) (stressing the need to take into account "the cultural common [***27] sense of the ordinary listener or reader"). [8]

> 8 The readers of Diadiun's column would also have been alerted to regard any implicit claim of impartiality by Diadiun with skepticism because Diadiun's newspaper is published in the county in which Mentor High School -- home to the team that was allegedly mauled at the wrestling meet -- is located. Where readers know that an author represents one side in a controversy, they are properly warned to expect that the opinions expressed may rest on passion rather than factual foundation. See, *e. g., Potomac Valve & Fitting Inc. v. Crawford Fitting Co., 829 F.2d at 1290* (explaining that the contents of a company's newsletter would be understood as reflecting the professional interests of the company rather than as "a dispassionate and impartial assessment" of a test of a competitor's product); *Information Control Corp. v. Genesis One Computer Corp., 611 F.2d 781, 784 (CA9 1980)* (recognizing that statements in the early weeks of litigation by one side about the other were likely to include unsubstantiated charges, but that these "are highly unlikely to be understood by their audience as statements of fact").

III

Although I agree with the majority that statements must be scrutinized for implicit factual assertions, the majority's scrutiny in this case does not "hold the balance true," 497 U.S. at 23, between protection of individual reputation and freedom of speech. The statements complained of neither state nor imply a false assertion of fact, and, under the rule the Court reconfirms today, they should be found not libel "'as a matter of constitutional law.'" *Ante*, at 17, quoting *Bresler, 398 U.S. at 13*. Readers of Diadiun's column are signaled repeatedly that the author does not actually know what Milkovich said at

the court hearing and that the author is surmising, from factual premises made explicit in the column, that Milkovich must have lied in court. [9]

> 9 Milkovich does not challenge the accuracy of any of Diadiun's stated premises. Nor does he complain or proffer proof that Diadiun had not, in fact, concluded from the stated premises that Milkovich must have lied in court. There is, therefore, no call to consider under what circumstances an insincere speculation would constitute a false and defamatory statement under *Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 89 L. Ed. 2d 783, 106 S. Ct. 1558 (1986)*. However, I would think that documentary or eyewitness testimony that the speaker did not believe his own professed opinion would be required before a court would be permitted to decide that there was sufficient evidence to find that the statement was false and submit the question to a jury. Without such objective evidence, a jury's judgment might be too influenced by its view of what was said. As we have long recognized, a jury "is unlikely to be neutral with respect to the content of speech and holds a real danger of becoming an instrument for the suppression of those 'vehement, caustic, and sometimes unpleasantly sharp attacks,' . . . which must be protected if the guarantees of the *First* and *Fourteenth Amendments* are to prevail." *Monitor Patriot Co. v. Roy, 401 U.S. 265, 277, 28 L. Ed. 2d 35, 91 S. Ct. 621 (1971)* (quoting *New York Times, 376 U.S. at 270*). See also *Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 510-511, 80 L. Ed. 2d 502, 104 S. Ct. 1949, and n.29 (1984)* (discussing the risks of submitting various questions to juries where freedom of speech is at stake); *Gertz, 418 U.S. at 349* (expressing concern about juries punishing unpopular opinion rather than compensating individuals for injuries sustained by the publication of a false fact); R. Smolla, Law of Defamation §§ 6.05(3)(a)-(c) (1990); Zimmerman, 18 U. C. D. L. Rev., at 430.

[*34] [**2714] Like the "imaginative expression" and the "rhetorical hyperbole" which the Court finds have "traditionally added much to the discourse of our Nation," 497 U.S. at 18, conjecture is intrinsic to "the free flow of ideas and opinions on matters of public interest and concern" that is at "the heart of the [***28] *First Amendment.*" *Falwell, 485 U.S. at 50*. The public and press regularly examine the activities of those who affect our lives. "One of the prerogatives of American citizenship is the right to criticize men and measures." *Id., at 51* (quoting *Baumgartner v. United States, 322 U.S. 665, 673-674, 88 L. Ed. 1525, 64 S. Ct. 1240 (1944)*). But often only some of the facts are known, and solely through insistent prodding -- through conjecture as well as research -- can important public questions be subjected to the "uninhibited, robust, and wide-open" debate to which this country is profoundly committed. *New York Times Co. v. Sullivan, 376 U.S. 254, 270, 11 L. Ed. 2d 686, 84 S. Ct. 710 (1964)*.

Did NASA officials ignore sound warnings that the Challenger Space Shuttle would explode? Did Cuban-American [*35] leaders arrange for John Fitzgerald Kennedy's assassination? Was Kurt Waldheim a Nazi officer? Such questions are matters of public concern long before all the facts are unearthed, if they ever are. Conjecture is a means of fueling a national discourse on such questions and stimulating public pressure for answers from those who know more. "'The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.'" *Id., at 269* (quoting *Stromberg v. California, 283 U.S. 359, 369, 75 L. Ed. 1117, 51 S. Ct. 532 (1931)*).

What may be more disturbing to some about Diadiun's conjecture than, say, an editorial in 1960 speculating that Francis Gary Powers was in fact a spy, despite the Government's initial assurances that he was not, is the naivete of Diadiun's conclusion. The basis of the court decision that is the subject of Diadiun's column was that Maple Heights had been denied its right to due process by the OHSAA. Diadiun, as it happens, not only knew this but included it in his column. But to anyone who knows what "due process" means, it does not follow that the court must have believed some lie about what happened at the wrestling meet, because what happened at the meet would not have been germane to the questions at issue. There may have been testimony about what happened, and that testimony may have been perjured, but to anyone who understands the patois of the legal profession there is no reason to assume -- from the court's

decision -- that such testimony must have been given.

Diadiun, therefore, *is* guilty. He is guilty of jumping to conclusions, of benightedly assuming that court decisions are always based on the merits, and of looking foolish to lawyers. He is not, however, liable for defamation. Ignorance, without more, has never served to defeat freedom of speech. "The constitutional protection does not turn upon 'the truth, popularity, or social utility of the ideas and beliefs which are [*36] offered.'" *New York Times, supra, at 271* (quoting *NAACP v. Button, 371 U.S. 415, 445, 9 L. Ed. 2d 405, 83 S. Ct. 328 (1963))*.

[***29] I appreciate this Court's concern with redressing injuries to an individual's reputation. But as long as it is clear to the reader that he is being offered conjecture and not solid information, the danger to reputation is [**2715] one we have chosen to tolerate in pursuit of "'individual liberty [and] the common quest for truth and the vitality of society as a whole.'" *Falwell, supra, at 50-51* (quoting *Bose Corp., 466 U.S. at 503-504*). Readers are as capable of independently evaluating the merits of such speculative conclusions as they are of evaluating the merits of pure opprobrium. Punishing such conjecture protects reputation only at the cost of expunging a genuinely useful mechanism for public debate. "In a society which takes seriously the principle that government rests upon the consent of the governed, freedom of the press must be the most cherished tenet." *Edwards v. National Audubon Society, Inc., 556 F.2d 113, 115* (CA2), cert. denied *sub nom. Edwards v. New York Times Co., 434 U.S. 1002, 54 L. Ed. 2d 498, 98 S. Ct. 647 (1977)*.

It is, therefore, imperative that we take the most particular care where freedom of speech is at risk, not only in articulating the rules mandated by the *First Amendment*, but also in applying them. "'Whatever is added to the field of libel is taken from the field of free debate.'" *New York Times, 376 U.S. at 272* (quoting *Sweeney v. Patterson, 76 U.S. App. D.C. 23, 24, 128 F.2d 457, 458*, cert. denied, *317 U.S. 678, 87 L. Ed. 544, 63 S. Ct. 160 (1942))*. Because I would affirm the Ohio Court of Appeals' grant of summary judgment to respondents, albeit on somewhat different reasoning, I respectfully dissent.

REFERENCES

50 Am Jur 2d, Libel and Slander 14

USCS, *Constitution, Amendment 1*

US L Ed Digest, Constitutional Law 947

Index to Annotations, *First Amendment*; Libel and Slander; Newspapers and Periodicals; New York Times Rule; Perjury

Annotation References:

Free speech and press clauses of *Federal Constitution's First Amendment* as affecting damages recoverable for defamation-- Supreme Court cases. *86 L Ed 2d 816.*

Progeny of New York Times v Sullivan in the Supreme Court. *61 L Ed 2d 975.*

Constitutional aspects of libel and slander-- Supreme Court cases. *28 L Ed 2d 885.*

Libel and slander: necessity of expert testimony to establish negligence of media defendant in defamation action by private individual. *37 ALR4th 987.*

Libel by newspaper headlines. *95 ALR3d 660.*

Libel and slander: who is a "public figure" in the light of *Gertz v Robert Welch, Inc. (1974) 418 US 323, 41 L Ed 2d 789, 94 S Ct 2997. 75 ALR3d 616.*

Libel and slander: what constitutes actual malice, within federal constitutional rule requiring public officials and public figures to show actual malice. *20 ALR3d 988.*

Libel and slander: who is a public official or otherwise within the federal constitutional rule requiring public officials to show actual malice. *19 ALR3d 1361.*

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SDV/ACCI, INC.; R. GERALD METZ; TONIA METZ, Plaintiffs-Appellants, v. AT&T CORPORATION; MARGARET E. ROMAN, Defendants-Appellees.

No. 06-15860

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

522 F.3d 955*; *2008 U.S. App. LEXIS 7829

February 12, 2008, Argued and Submitted, San Francisco, California
April 11, 2008, Filed

PRIOR HISTORY: [**1]

Appeal from the United States District Court for the Northern District of California. D.C. No. CV-02-01529-VRW. Vaughn R. Walker, District Judge, Presiding.

DISPOSITION: AFFIRMED in part, REVERSED in part, and REMANDED.

COUNSEL: Paul Kleven, Berkeley, California, for the plaintiffs-appellants.

Kevin M. Fong, Pillsbury, Winthrop, Shaw, Pittman, LLP, San Francisco, California, for the defendants-appellees.

JUDGES: Before: William C. Canby, Jr., David R. Thompson, and Milan D. Smith, Jr., Circuit Judges. MILAN D. SMITH, JR., Circuit Judge, concurring in part, and dissenting in part.

OPINION BY: CANBY

OPINION

[*957] CANBY, Circuit Judge:

Plaintiffs SDV/ACCI, Tonia Metz and Gerald Metz brought this action against AT&T and one of its employees, Margaret Roman, alleging that Ms. Roman defamed the plaintiffs in the course of her employment. The district court granted summary judgment for the defendants, ruling that the Metzes were not proper plaintiffs, and that the allegedly defamatory statements were conditionally privileged. It further ruled that SDV/ACCI, as the remaining plaintiff, could not defeat the privilege because there was no evidence that Ms. Roman made the allegedly defamatory statements with malice or without a good faith belief in their [**2] truth. The plaintiffs appealed. We have jurisdiction pursuant to *28 U.S.C. § 1291*. We affirm in part, and reverse in part.

[*958] **FACTUAL AND PROCEDURAL BACKGROUND**

Plaintiff SDV/ACCI, Inc., is a company that provides clients with consulting and staffing services. Plaintiffs Mr. and Ms. Metz are the company's CFO and CEO, respectively, and its sole shareholders. Effective February 1, 1999, defendant AT&T and SDV/ACCI entered into an agreement under which SDV/ACCI would provide temporary workers to AT&T and its subsidiaries. The agreement specified that all invoices

would be payable by AT&T ten days from the date of receipt.

The parties agree that over the life of the agreement, AT&T failed to pay many of these bills on time. In her affidavit, Ms. Metz claimed that she confronted AT&T procurement specialist Margaret Roman prior to November 2000 about these payment problems. Ms. Metz claimed that, when confronted, Ms. Roman told her that before Ms. Metz withdrew SDV/ACCI's services, she should consider how powerful AT&T was and how it would appear to other clients if SDV/ACCI could not meet its service obligations to AT&T. Moreover, some complaints had arisen regarding payment of certain staff [**3] by SDV/ACCI. Although the parties dispute the extent and cause of these problems, it appears that they were due in part to an internal embezzlement that SDV/ACCI had suffered, a fact that Ms. Metz expressed to Ms. Roman. SDV/ACCI was at all times solvent.

On December 5, 2000, Mr. Metz notified Ms. Roman that he was going to terminate the agreement because of AT&T's failure to pay the invoices within 10 days, and that payroll would stop after that week. Ms. Roman protested that it was especially difficult to effect a transition to other vendors on such short notice, so Mr. Metz agreed to continue payroll until December 15. Ms. Roman complained further that it was difficult to transfer employees around the holidays, and asked if Mr. Metz was discontinuing service because of the recent embezzlement at SDV/ACCI or "because you can't afford to do business?" Mr. Metz responded, "ACCI is healthy except for the cost we've incurred from this contract, which I'm resolving today. Marge, there's nothing wrong with my business except for the time I'm having to spend on our contract." Ms. Roman then asked Mr. Metz not to say anything to the AT&T managers or employees about the transition, e-mailing [**4] a similar request on December 15, 2000 that Mr. Metz inform managers of the situation only on a "need to know" basis. Mr. Metz swore in an affidavit that he believed Ms. Roman was "very annoyed" and "felt animosity" toward him during the phone call.

After the conversation, Ms. Roman sent e-mails to several AT&T managers stating that SDV/ACCI employees would be transferred to another vendor. The e-mails contained language similar to the following:

> SDV/ACCI are currently having financial difficulties and can no longer provide services to AT&T.

Ms. Roman and another manager also sent these e-mails to two individuals who worked for a competitor of SDV/ACCI and who were involved with the transitions.

In her deposition, Ms. Roman acknowledged that, at the time she made the statements, she did not think SDV/ACCI was unable to perform on the contract. Elsewhere, Ms. Roman asserted that, at the time she made the statements, she believed the plaintiffs' financial difficulties may have played a part in their decision. Ms. Roman also stated that she made the statements to convey a sense of urgency to the recipients.

DISCUSSION

We review de novo the district court's grant of summary judgment. *Universal* [*959] *Health Servs., Inc. v. Thompson, 363 F.3d 1013, 1019 (9th Cir. 2004).* [**5] In California, the definition of libel includes "a false and unprivileged publication by writing . . . which has a tendency to injure [any person] in his occupation." *Cal. Civ. Code § 45.* We first consider whether the Metzes as individuals were proper plaintiffs in this action. After that, we address whether the district court erred when it held that the common interest privilege foreclosed a trial on the merits.

I

The district court held that the Metzes could not sue as individuals for defamation directed at their company because the allegedly defamatory statements could not reasonably be interpreted as referring to the plaintiffs as individuals. We affirm on a somewhat different ground from that relied upon by the district court.

In California, whether statements can be reasonably interpreted as referring to plaintiffs is a question of law for the court. *Alszeh v. HBO, 67 Cal. App. 4th 1456, 1461, 80 Cal. Rptr. 2d 16 (1998).* If there is no express reference to the plaintiff in a defamatory statement, the claim will fail unless the statement refers to the plaintiff by reasonable implication. *See Blatty v. N.Y. Times Co., 42 Cal. 3d 1033, 1046, 232 Cal. Rptr. 542, 728 P.2d 1177 (1986)* [**6] (intentional interference case citing defamation cases).

In some cases, it is relatively clear that defamatory

statements about a company can reasonably be understood to refer to the owner of the company, as in *Bohan v. Record Publishing Co., 1 Cal. App. 429, 430-31, 82 P. 634 (1905)*, and *Schiavone Constr. Co. v. Time, Inc., 619 F. Supp. 684, 696-97 (D.N.J. 1985)*. In these cases the businesses bore the individual plaintiff's name, and in *Bohan* the defamatory statement explicitly referred to "the *proprietor* of the firm." *1 Cal. App. at 430*. Neither case expressly required, however, that plaintiffs share the name of their business in order to maintain a suit. AT&T cites no California case (and we can find none) that addresses the question whether an owner of a closely-held corporation can maintain an action for a defamatory statement that refers expressly to the business alone. Cases from other jurisdictions give little aid because the results diverge greatly. *See, e.g., U.S. Steel Corp. v. Darby, 516 F.2d 961, 964 n.4 (5th Cir. 1975)* (shareholder suit disallowed, but suit as sole proprietor permitted); *Shop Called East, Inc. v. KYW-Channel 3,* 8 Med. L. Rptr. 1399, 1401-02 (D.N.J. 1982) (suit by dual [**7] owners of corporation allowed); *McBride v. Crowell-Collier Publ'g Co., 196 F.2d 187, 189 (5th Cir. 1952)* (suit by sole shareholder disallowed). Thus we can draw no categorical conclusion whether California would or would not infer that defamation of a closely-held corporation would permit suit by its owners.

In the absence of a fixed rule, the Metzes argue that, under the facts of their case, any defamation of their business could reasonably be understood as referring to them. They contend that their "reputations were closely associated with the small corporation that they owned, so that any statements defaming SDV/ACCI regarding its financial problems and inability to perform would necessarily reflect on their reputations." We need not resolve this question, however, because there is an independent ground to support the district court's decision. To proceed with their suit as individuals, the Metzes must show not only that the statement could reasonably be understood as referring to them as individuals, but also that some third party understood the statement in this way. *See DeWitt v. Wright, 57 Cal. 576, 578 (1881)*; *Smith v. Maldonado, 72 Cal. App. 4th 637, 645, 85 Cal. Rptr. 2d 397 (1999)*.

[*960] The Metzes cite [**8] *Church of Scientology of California v. Flynn, 744 F.2d 694 (9th Cir. 1984)*, for the proposition that "[i]t is sufficient if from the evidence the jury can infer that the defamatory statement applies to the plaintiff." *Id. at 697* (quoting *Di Giorgio Fruit Corp. v. AFL & CIO, 215 Cal. App. 2d 560, 30 Cal. Rptr. 350 (1963))*. The Metzes read *Flynn* as eliminating the need to show that a third party *actually* understood the statement to refer to the plaintiffs. We reject this contention. *Flynn* arose out of a motion to dismiss for failure to state a claim; the court held that dismissal was improper because, among other reasons, the complaint alleged that the defamatory remarks were understood by the listening public to apply to the plaintiff. *See Id. at 697*.

Flynn thus does not modify the rule that a defamatory statement that is ambiguous as to its target not only must be capable of being understood to refer to the plaintiff, but also must be shown actually to have been so understood by a third party. *See DeWitt, 57 Cal. at 578* ("[I]t is essential not only that it should have been written concerning the plaintiff, but also that it was *so understood* by at least some one third person."); *Restatement (Second) of Torts § 564 cmt. a* [**9] (1977) ("It is necessary that the recipient of the defamatory communication understand it as intended to refer to the plaintiff.").

The Metzes failed to provide admissible evidence to support this second requirement of their defamation claim. They presented some testimony in the district court that third parties communicated with them in a way that implied that the allegedly defamatory statements referred to the plaintiffs as individuals. The district court held that this evidence lacked foundation and struck it from the record. The plaintiffs do not challenge its exclusion on appeal. The plaintiffs cite no other evidence in the record suggesting that any third party understood the statements as referring to the Metzes by implication.

For the same reason, the Metzes cannot find refuge in the well-settled doctrine that small groups of plaintiffs may sometimes recover even though they are defamed in the aggregate. *See Blatty, 42 Cal. 3d at 1046* (collecting cases and holding that individual defamation suits may lie when groups with fewer than twenty-five members are defamed); *Kilpatrick, 85 N.J.L. 7, 88 A. 839, 840 (N.J. Sup. 1913)*; *Restatement (Second) of Torts § 564A*. The alleged defamation in this [**10] case referred only to the corporation. The Metzes have not produced admissible evidence to show that the defamation was understood by any third party to apply to a group that included the Metzes. During her deposition, Ms. Roman

testified that she knew of two recipients of the e-mail who had previously dealt directly with the Metzes. There was no evidence other than the Metzes' unfounded assertions to suggest that these managers, or any other recipient of the e-mails, knew about the ownership structure of SDV/ACCI and the Metzes' roles within the organization. This evidence, without more, is not sufficient to support an inference that any manager understood the e-mails to refer to the Metzes in addition to SDV/ACCI. [1]

> 1 The Metzes place great weight in the fact that the "SDV" portion of the SDV/ACCI name stands for "Service Disabled Veteran," indicating that the company is qualified to do business as a Disabled Veteran Business Enterprise under federal and California law. The plaintiffs insist that this phrase refers "specifically" to Mr. Metz as the service disabled veteran in the enterprise, so any defamation of SDV/ACCI would necessarily defame Mr. Metz. We reject this contention. [**11] There has been no showing that the recipients of the e-mails understood the acronym "SDV" to refer to Mr. Metz.

[*961] In holding as we do, we do not impugn the common law rule that circumstantial evidence may be used to prove that defamatory material was published to a third party who reasonably understood it to refer to the plaintiffs. *See Food Lion, Inc. v. Melton, 250 Va. 144, 458 S.E.2d 580, 585 (Va. 1995)* (collecting cases from seven other states). It is not always necessary for a plaintiff to present "testimony from a third party regarding what that person heard and understood." *Id.* We simply apply the rule that when a defamatory statement identifies the plaintiff only by implication, and the implication is reasonable but by no means necessary, the plaintiff carries a corresponding burden to present evidence that a recipient of the statement made the implied connection. *See Davis v. Hearst, 160 Cal. 143, 116 P. 530, 548 (Cal. 1911)* ("[W]here the libel is covertly expressed or ambiguous worded, evidence is required to show that the plaintiff is the party to whom it applies, or was intended to apply. But . . . if the jury find that any person to whom it was published would understand it as applying to the plaintiff, [**12] that will be sufficient to sustain the verdict." (quoting Henry Folkard, *Slander & Libel* at 276 (7th ed. 1908))), *overruled on other grounds by Sheldon Appel Co. v. Albert & Oliker, 47 Cal.3d 863, 254 Cal. Rptr. 336, 765 P.2d 498 (1989)*; Dan B. Dobbs, *The Law of Torts* § 405 (2000) ("[E]xtrinsic facts, if known to at least one recipient of [a publication not internally identifying the plaintiff], may demonstrate that it referred to the plaintiff.").

Because there was no evidence that the e-mails were actually understood by any recipient to refer to the plaintiffs, we need not address whether any such understanding was reasonable under *Bohan* and *Blatty.* Therefore, we hold that the Metzes have not presented sufficient evidence to proceed with their claim as dual proprietors of SDV/ACCI.

II

AT&T next contends that even if the e-mails were defamatory with respect to SDV/ACCI, the contents of the e-mails were privileged and therefore not actionable. *California Civil Code Section 47(c)* specifies that privilege protects a statement made

> [i]n a communication, without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such a relation to the person interested as to afford a reasonable [**13] ground for supposing the motive for the communication to be innocent, or (3) who is requested by the person interested to give the information. . . ."

"The applicability of the *[Section 47(c)]* privilege provision is a question of law where . . . the facts alleged to give rise to the privilege are undisputed." *Vackar v. Package Machinery Co., 841 F. Supp. 310, 313 (N.D. Cal. 1993).* For reasons we set forth below, we hold that this common interest privilege is potentially applicable to Ms. Roman's e-mails, but that issues of fact remain that render summary judgment inappropriate.

A. The Occasion for the Communication

"The defendant has the initial burden of showing the allegedly defamatory statement was made on a privileged occasion . . . ." *Kashian v. Harriman, 98 Cal. App. 4th 892, 915, 120 Cal. Rptr. 2d 576 (2002).* We conclude that the defendants have carried this initial burden. Ms. Roman communicated the allegedly libelous statements to employees of AT&T and others involved with transferring the employees to a new vendor. She shared a

business and organizational relationship with the recipients. Therefore, the privilege extends to these relationships.

[*962] The plaintiffs argue, however, that Ms. Roman's communications [**14] exceeded the scope of the privilege. The privilege "may be lost if the defendant abuses the privilege by excessive publication or the inclusion of immaterial matter which have no bearing upon the interest sought to be protected . . . ." *Gardner v. Shasta County, No. 2:06-CV-0106, 2007 U.S. Dist. LEXIS 81047, 2007 WL 3243847, at *5 (E.D. Cal. Nov. 1, 2007)* (quoting *Deaile v. Gen. Tel. Co., 40 Cal. App. 3d 841, 847, 115 Cal. Rptr. 582 (1974))*. "[T]o be protected, the communication must be one reasonably calculated to further [the common] interest." *Cuenca v. Safeway S.F. Employees Fed. Credit Union, 180 Cal. App. 3d 985, 995, 225 Cal. Rptr. 852 (1986)* (citation and internal quotation marks omitted).

The plaintiffs argue that Ms. Roman's communications fell outside the scope of the privilege because the recipients "had no legitimate common interest in SDV/ACCI's 'financial difficulties.'" Perhaps this is so insofar as the "financial difficulties" phrase was not strictly necessary to the message that Ms. Roman needed to convey, namely, that employees needed to be transferred to a new vendor. The plaintiffs' approach, however, places too drastic a restraint on the scope of the common interest privilege, a scope that is "not capable of precise or categorical [**15] definition." *Kashian, 98 Cal. App. 4th at 914*. The standard is one of reasonableness, not of necessity. *See Cuenca, 180 Cal. App. 3d at 995*. Even putting aside Ms. Roman's asserted desire to convey a sense of urgency, which is in dispute, the "financial difficulties" phrase still has relevance to the underlying communication. Conceivably, it provides the recipients with an understanding of why they have been assigned a difficult task. It puts to rest any urge to blame Ms. Roman or AT&T for the unwelcome news. It also undermines any hope of challenging the order; these "financial difficulties" make the managers' task imminent and unavoidable. Therefore, the common interest privilege is applicable on its face to the "financial difficulties" language.

B. Ms. Roman's State of Mind

Even if the communication furthers a common interest of the parties to the communication, a plaintiff may still defeat the privilege. *Section 47(c)* specifies that the privilege does not protect statements made with malice. In addition, California courts have held that "ordinarily the privilege is lost if defendant has no reasonable grounds for believing his statements to be true." *Inst. of Athletic Motivation v. Univ. of Ill., 114 Cal. App. 3d 1, 12, 170 Cal. Rptr. 411 (1980)*. [**16] We hold that, contrary to the view of the district court, triable issues exist as to malice and good faith, so summary judgment on this issue was improper.

1. Malice

"Malice" as used in *section 47(c)* includes the following subjectively oriented definition:

> "Malice" . . . means a state of mind arising from hatred or ill will, evidencing a willingness to vex, annoy or injure another person. Thus the privilege is lost if the publication is motivated by hatred or ill will toward plaintiff, or by any cause other than the desire to protect the interest for the protection of which the privilege is given.

Cabanas v. Gloodt Assocs., 942 F. Supp. 1295, 1301 n.7 (E.D. Cal. 1996) (citations and internal quotation marks omitted). Malice may not be inferred from the publication itself. *Cal. Civ. Code § 48*. The plaintiff bears the burden of proving malice. *Lundquist v. Reusser, 7 Cal. 4th 1193, 1211, 31 Cal. Rptr. 2d 776, 875 P.2d 1279 (1994)*.

[*963] A showing that malice merely exists is not sufficient to defeat the privilege. "If the occasion is conditionally privileged, if the defendant's primary motive is the advancement of the interest which the privilege protects and if he speaks in good faith, the mere fact that he harbors ill will toward [**17] the plaintiff should be a neutral factor." *Biggins v. Hanson, 252 Cal. App. 2d 16, 20, 59 Cal. Rptr. 897 (1967)*.

The district court based its conclusion that the plaintiffs could not show malice solely on a bit of deposition testimony where Mr. Metz admitted a belief that Ms. Roman did not "hate" him and his wife at the time Ms. Roman sent the e-mails. This admission, however, is but one piece of evidence and it will not bear the conclusive effect that the district court accorded it on the issue of malice. *See Fed. R. Civ. P. 36* advisory committee's note (contrasting the binding effect of a *Rule 36* admission with the effect of an evidentiary admission

of a party); *Sanders v. N.Y. City Human Res. Admin., 361 F.3d 749, 757 (2d Cir. 2004)* (*Rule 801* admission of opinion is not binding admission under *Rule 36*); *Punzak v. Allstate Ins. Co., No. 07-1052, 2007 U.S. Dist. LEXIS 28574, 2007 WL 1166087, at *5 (E.D. Pa. Apr. 16, 2007)*.

Regardless of its truth, Mr. Metz's statement does not dispose of the question at issue. *Cabanas* defines malice to include hatred *or* ill-will, specifying that the privilege is also lost if the communication is motivated "by any cause other than the desire to protect the interest for the protection of which the privilege [**18] is given." *Cabanas, 942 F. Supp. at 1301 n.7*. Whether or not Ms. Roman hated plaintiffs at the time the e-mails were sent is not the same question as whether Ms. Roman was primarily motivated by ill will, spite, or some other improper motive, in sending the e-mails. Mr. Metz recognized this distinction in his testimony when he stated that Ms. Roman felt "animosity" though she did not hate him.

Moving beyond the district court's reasoning, we hold that the plaintiffs presented enough evidence of malice to survive summary judgment. Ms. Metz stated in her affidavit that when confronted regarding AT&T's performance under the contract, Ms. Roman made menacing comments to the plaintiffs about the dangers of withdrawing services from such a big company. Ms. Roman made the allegedly defamatory statements shortly after the plaintiffs had renounced the contract. In addition, Mr. Metz formed an impression that Ms. Roman became angry when he withdrew his services, an impression supported by the arguably mocking question Ms. Roman asked about his ability to do business. These circumstances permit an inference that she included the alleged defamation in her e-mail to make good on her prior threat. [**19] The implication of Ms. Roman's statement--that plaintiffs were to blame for the situation--might be viewed by a trier of fact as disingenuous in light of the repeated failure of AT&T to pay SDV/ACCI's bills on time. The fact that Ms. Roman instructed Mr. Metz not to communicate with the managers might also contribute to a finding by a reasonable trier of fact that Ms. Roman had a motive to deceive beyond the common purpose protected by the privilege. Mr. Metz stated in a deposition that he did not believe Ms. Roman harbored animosity toward him prior to December 5. However, the issue in this case is Ms. Roman's state of mind at the time she sent the e-mails, not her state of mind prior to December 5. Making all inferences in the light favorable to the plaintiffs, we conclude that there is enough circumstantial evidence to permit a reasonable trier of fact to find that malice primarily motivated the publication regarding SDV/ACCI's financial difficulties and ability to perform under the agreement.

[*964] *2. A Good Faith Belief in the Truth of the Statement*

Finally, a plaintiff can defeat the privilege by showing that the defendant "ha[d] no reasonable grounds for believing [the] statements to [**20] be true." *Inst. of Athletic Motivation, 114 Cal. App. 3d at 12*. Prior to sending the e-mails, Ms. Roman was told by Ms. Metz that the plaintiffs had suffered some setbacks stemming from an instance of embezzlement. Mr. Metz also told Ms. Roman, before she sent the e-mails, that the plaintiffs were not in financial distress, and that the only problem of their business was the cost of, and time taken by, the AT&T contract. Nothing in the record suggests that Ms. Roman had firsthand knowledge of the plaintiffs' financial position, except to the extent AT&T was failing to make timely payments. During her deposition, Ms. Roman admitted that at the time she sent the e-mails, she understood that the plaintiffs "were able to [provide services], but they chose not to." At another point, Ms. Roman testified that Mr. Metz had told her "he couldn't do it [provide services] any more." These factors, particularly when viewed alongside the evidence of malice, raise a triable issue as to her good faith belief in the truth of her statement, an issue that a trier of fact must decide. Therefore, we reverse the grant of summary judgment on the issue of good faith.

CONCLUSION

Because the Metzes presented [**21] no evidence that any recipient of Ms. Roman's e-mails understood the e-mails to refer to the Metzes as distinct from their corporation, we hold they cannot proceed in their claim as individuals. Therefore, summary judgment was appropriate as to them. SDV/ACCI may nonetheless proceed with its action. Although the common interest privilege potentially applies, it does not bar the action as a matter of law because genuine issues of fact remain as to whether malice was Ms. Roman's primary reason to include the alleged defamation in her e-mails and whether Ms. Roman lacked a good faith belief in the truth of her statement. We therefore reverse the summary judgment

against SDV/ACCI and remand for further proceedings consistent with this opinion.

The plaintiffs are entitled to two-thirds of their costs on appeal.

AFFIRMED in part, REVERSED in part, and REMANDED.

CONCUR BY: MILAN D. SMITH, JR. (In Part)

DISSENT BY: MILAN D. SMITH, JR. (In Part)

DISSENT

MILAN D. SMITH, JR., Circuit Judge, concurring in part, and dissenting in part:

I concur in Part I of the majority opinion, affirming summary judgment as to the Metzes' individual claims because they have failed to present evidence that any recipient of the emails actually understood [**22] them to refer to plaintiffs. I respectfully dissent, however, as to Part II.B because I would further hold that the Metzes have also failed to present evidence of malice or bad faith sufficient to vitiate the common interest privilege, and I would affirm the district court's grant of AT&T's motion for summary judgement.

1. *Malice*

I agree that the district court erred to the extent it concluded that Mr. Metz's statement that Ms. Roman did not "hate" him and his wife was a binding admission that estopped the Metzes from contending that Ms. Roman's email was motivated by malice. That remark, given in a deposition and immediately qualified, [1] does not constitute a judicial admission that would bar [*965] presentation of evidence that Ms. Roman was motivated by malice, whether mere "animosity" or outright hatred. Removing that bar, however, does not relieve the plaintiffs of the burden of proving not only that malice was present when Ms. Roman wrote the email, but also that malice was the *primary* motive for the communications. "[I]f the publication is made for the purpose of protecting the interest in question, the fact that the publication is inspired in part by resentment or indignation at the [**23] supposed misconduct of the person defamed does not constitute an abuse of the privilege." *Williams v. Taylor, 129 Cal. App. 3d 745, 752-53, 181 Cal. Rptr. 423 (1982)* (quoting *Restatement (Second) of Torts § 603, cmt. a* (1977)); *Biggins v. Hanson, 252 Cal. App.2d 16, 20, 59 Cal. Rptr. 897.*

> 1 Mr. Metz clarified a few seconds thereafter, "She definitely didn't like working vacation--during the Christmas, but I don't think--hate's a pretty big word."

Mr. Metz's assertion, made in his deposition, that Ms. Roman felt "animosity" toward him not rising to the level of hatred cannot constitute "evidence" of malice. Mr. Metz speculated that "there was some anger, you know, some hostility" because his actions required Ms. Roman to work over the holidays, but admitted that "[t]hats just me. That's just what I think." When pressed as to why he thought that, Mr. Metz was clear that his belief was based solely on the fact that Ms. Roman had written a false statement in her email: "It's not a good statement to say. So what drove it? The only thing I can think that drove it is negative feelings, you know." *Cal. Civ. Code § 48* is clear, however, that malice cannot be inferred from the fact of the communication itself.

Apart from Mr. Metz's assertions [**24] of "anger" and "animosity," the only other concrete evidence the plaintiffs have proffered is Ms. Metz's report of a threat by Ms. Roman, some unspecified time earlier, that the Metzes "needed to consider that AT&T was very powerful before withdrawing any services, because it would not look good if other clients thought we would not service AT&T properly, and she would spread the information widely." The services were withdrawn, and shortly thereafter, Ms. Roman sent her emails. While relevant to an inquiry into malice, such a remark, without more, does not perceptibly advance plaintiffs' cause. "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).* No reasonable jury, even if it believed that the threat was actually uttered, could infer from the threat alone that malice, rather than the privileged purpose, was the primary motivation for Ms. Roman's email.

2. Good Faith Basis

The majority also errs in stating that plaintiffs have provided sufficient evidence to meet their burden that the defendant [**25] had no reasonable ground for believing her statements to be true. At the time the subject emails

were sent, Ms. Metz had personally told Ms. Roman by email that SDV/ACCI had suffered a large-scale theft by employees who had disrupted SDV/ACCI's accounting system in an effort to cover their tracks. She also knew that several AT&T managers had complained about late and improperly calculated paychecks. She knew from an email sent by Shirley Delia, a co-worker who had spoken with Mr. Metz, that SDV/ACCI had suffered significant financial problems caused by Mr. Metz's medical disabilities. Finally, she knew that Mr. Metz was calling to abruptly cancel the SDV/ACCI contract because of late payments, and would not even grant an extension so the transition could occur after the holidays. Mr. Metz's assurance to Ms. Roman during that same conversation that SDV/ACCI was not in [*966] financial trouble is insufficient to negate a good faith belief Ms. Roman might have had about plaintiffs' financial position: Common sense suggests that what Mr. Metz said is exactly the type of comment the owner of a company on the verge of insolvency *would* make.

The only evidence on this issue in plaintiffs' favor is [**26] Ms. Roman's contradictory remarks in testimony: at one point in the deposition, she commented that "[a]t that point they were able to [provide services], but they chose not to"; at another, she says that "[H]e couldn't do it anymore." This apparent contradiction, however, does nothing to undermine the *other* evidence of SDV/ACCI's financial instability Roman had at the time--the "multitude of factors" she cited in testimony as the basis for her belief that SDV/ACCI was in financial difficulty. In other words, plaintiffs' case rests upon a mere scintilla, which I would hold is insufficient to defeat the privileged occasion and avoid summary judgment.

Because I do not believe that a reasonable jury, presented with the two modica of evidence that plaintiffs have put forward to defeat the privileged occasion, could find either the presence of malice or the absence of reasonable grounds to believe the truth of the emails' content, I respectfully dissent from the majority opinion, and would affirm the district court's grant of summary judgement for AT&T.

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ST. AMANT v. THOMPSON

No. 517

SUPREME COURT OF THE UNITED STATES

390 U.S. 727*; *88 S. Ct. 1323*; *20 L. Ed. 2d 262*; *1968 U.S. LEXIS 3004*; *1 Media L. Rep. 1586

April 4, 1968, Argued
April 29, 1968, Decided

PRIOR HISTORY: CERTIORARI TO THE SUPREME COURT OF LOUISIANA.

DISPOSITION: *250 La. 405, 196 So. 2d 255,* reversed and remanded.

SYLLABUS

Petitioner made a televised political speech in the course of which he read questions which he had put to a union member, Albin, and Albin's answers; the answers falsely charged respondent, a public official, with criminal conduct. Respondent sued petitioner for defamation and was awarded damages by the trial judge. The trial judge, having considered *New York Times Co. v. Sullivan, 376 U.S. 254 (1964)*, decided after the trial, denied a motion for a new trial. An intermediate appellate court reversed the trial court's judgment, having found that petitioner had not acted with actual malice within the meaning of the *New York Times* rule, *i. e.*, with knowledge that petitioner's statements were false or with reckless disregard of whether they were false or not. The State Supreme Court reversed, finding that there had been sufficient evidence that petitioner had acted in "reckless disregard" in that petitioner had no personal knowledge of respondent's activities; relied solely on Albin's affidavit though there was no evidence as to Albin's veracity; failed to verify the information with others who might know the facts; did not consider whether the statements were defamatory; and mistakenly believed that he had no responsibility for the broadcast because he was merely quoting Albin. *Held*: In order that it can be found that a defendant, within the meaning of *New York Times*, acted in "reckless disregard" of whether a defamatory statement which he made about a public official is false or not, there must be sufficient evidence to permit the conclusion that the defendant had serious doubts as to the truth of his publication. Pp. 730-733.

(a) In a defamation action by a public official reckless conduct is not measured by whether a reasonably prudent man would have published the statement or would have investigated before publishing. P. 731.

(b) The people's stake in the conduct of public officials is so great that neither the defense of truth nor the standard of ordinary care would adequately implement *First Amendment* policies. Pp. 731-732.

(c) A defendant's testimony that he acted in good faith is not conclusive as to that issue, since the fact finder in the light of all the surrounding circumstances

must determine whether the publication was indeed made in good faith. P. 732.

(d) The evidence in this case is not sufficient to permit the conclusion that petitioner acted in reckless disregard of whether the statements about respondent were false or not. Pp. 732-733.

COUNSEL: Russell J. Schonekas argued the cause and filed a brief for petitioner.

Robert L. Kleinpeter argued the cause and filed a brief for respondent.

JUDGES: Warren, Black, Douglas, Harlan, Brennan, Stewart, White, Fortas, Marshall

OPINION BY: WHITE

OPINION

[*728] [***265] [**1324] MR. JUSTICE WHITE delivered the opinion of the Court.

[***LEdHR1] [1]The question presented by this case is whether the Louisiana Supreme Court, in sustaining a judgment for damages in a public official's defamation action, correctly interpreted and applied the rule of *New York Times Co. v. Sullivan, 376 U.S. 254 (1964)*, that the plaintiff in such an action must prove that the defamatory publication "was made with 'actual malice' -- that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *376 U.S., at 279-280.*

On June 27, 1962, petitioner St. Amant, a candidate for public office, made a televised speech in Baton Rouge, Louisiana. In the course of this speech, St. Amant read a series of questions which he had put to J. D. Albin, a member of a Teamsters Union local, and Albin's answers to those questions. The exchange concerned the allegedly nefarious activities of E. G. Partin, the president of the local, and the alleged relationship between Partin and St. Amant's political opponent. One of Albin's answers concerned his efforts to prevent Partin from secreting union records; in this answer Albin referred to Herman A. Thompson, an East Baton Rouge Parish deputy sheriff and respondent here:

"Now, we knew that this safe was gonna be moved that night, but imagine our predicament, knowing [*729] of Ed's connections with the Sheriff's [***266] office through Herman Thompson, who made recent visits to the Hall to see Ed. We also knew of money that had passed hands between Ed and Herman Thompson . . . from Ed to Herman. We also knew of his connections with State Trooper Lieutenant Joe Green. We knew we couldn't get any help from there and we didn't know how far that he was involved in the Sheriff's office or the State Police office through that, and it was out of the jurisdiction of the City Police." [1]

1 St. Amant had preceded this question and answer with other answers by Albin asserting that Partin, on learning that a union member had written to the Secretary of Labor charging that Partin had been stealing union funds, had become "pretty riled up" and had decided to "get rid of the safe" containing the union records.

Thompson promptly brought suit for defamation, claiming that the publication had "impute[d] . . . gross misconduct" and "infer[red] conduct of the most nefarious nature." The case was tried prior to the decision in *New York Times Co.* v. *Sullivan, supra.* The trial judge ruled in Thompson's favor and awarded $ 5,000 in damages. Thereafter, in the course of entertaining and denying a motion for a new trial, the Court considered the ruling in *New York Times*, finding that rule no barrier to the judgment already entered. The Louisiana Court of Appeal reversed because the record failed to show that St. Amant had acted with actual malice, as required by *New York Times. 184 So. 2d 314 (1966).* The Supreme Court of Louisiana reversed the intermediate appellate [**1325] court. *250 La. 405, 196 So. 2d 255 (1967).* In its view, there was sufficient evidence that St. Amant recklessly disregarded whether the statements about Thompson were true or false. We granted a writ of certiorari. *389 U.S. 1033 (1968).*

[*730] [***HRLEd2A] [2A]For purposes of this case we accept the determinations of the Louisiana courts that the material published by St. Amant charged Thompson with criminal conduct, that the charge was false, and that Thompson was a public official [2] and so had the burden of proving that the false statements about Thompson were made with actual malice as defined in *New York Times Co.* v. *Sullivan* and later cases. We cannot, however, agree with either the Supreme Court of Louisiana or the

trial court that Thompson sustained this burden.

[***LEdHR2B] [2B]

> 2 The Louisiana Supreme Court concluded, after considering state law, that a deputy sheriff has "substantial responsibility for or control over the conduct of governmental affairs," the test established by *Rosenblatt v. Baer, 383 U.S. 75, 85 (1966)*, "at least where law enforcement and police functions are concerned." *250 La., at 422, 196 So. 2d, at 261.*

Purporting to apply the *New York Times* malice standard, the Louisiana Supreme Court ruled that St. Amant had broadcast false information about Thompson recklessly, though not knowingly. Several reasons were given for this conclusion. St. Amant had no personal knowledge of Thompson's activities; he relied solely on Albin's affidavit although the record was silent as to Albin's reputation for veracity; he failed to verify the information with those in the union office who might have known the facts; he gave no consideration to whether or not the statements defamed Thompson and went ahead heedless of the consequences; and he mistakenly believed he had no responsibility for the broadcast because he was merely quoting Albin's words.

[***267] [***LEdHR3A] [3A] [***LEdHR4] [4]These considerations fall short of proving St. Amant's reckless disregard for the accuracy of his statements about Thompson. "Reckless disregard," it is true, cannot be fully encompassed in one infallible definition. Inevitably its outer limits will be marked out through case-by-case adjudication, as is true with so many legal standards [*731] for judging concrete cases, whether the standard is provided by the Constitution, statutes, or case law. Our cases, however, have furnished meaningful guidance for the further definition of a reckless publication. In *New York Times, supra*, the plaintiff did not satisfy his burden because the record failed to show that the publisher was aware of the likelihood that he was circulating false information. In *Garrison v. Louisiana, 379 U.S. 64 (1964)*, also decided before the decision of the Louisiana Supreme Court in this case, the opinion emphasized the necessity for a showing that a false publication was made with a "high degree of awareness of . . . probable falsity." *379 U.S., at 74.* MR. JUSTICE HARLAN's opinion in *Curtis Publishing Co.* v. *Butts, 388 U.S. 130, 153 (1967)*, stated that evidence of either deliberate falsification or reckless publication "despite the publisher's awareness of probable falsity" was essential to recovery by public officials in defamation actions. These cases are clear that reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.

[**1326] [***LEdHR5] [5] [***LEdHR6] [6]It may be said that such a test puts a premium on ignorance, encourages the irresponsible publisher not to inquire, and permits the issue to be determined by the defendant's testimony that he published the statement in good faith and unaware of its probable falsity. Concededly the reckless disregard standard may permit recovery in fewer situations than would a rule that publishers must satisfy the standard of the reasonable man or the prudent publisher. But *New York Times* and succeeding cases have emphasized that the stake of the [*732] people in public business and the conduct of public officials is so great that neither the defense of truth nor the standard of ordinary care would protect against self-censorship and thus adequately implement *First Amendment* policies. Neither lies nor false communications serve the ends of the *First Amendment*, and no one suggests their desirability or further proliferation. But to insure the ascertainment and publication of the truth about public affairs, it is essential that the *First Amendment* protect some erroneous publications as well as true ones. We adhere to this view and to the line which our cases have drawn between false communications which are protected and those which are not.

[***LEdHR7] [7]The defendant in a defamation action brought by a public official cannot, however, automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith. Professions of good faith will be unlikely to prove [***268] persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, recklessness may

be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports. [3]

3 See, *e. g., Curtis Publishing Co.* v. *Butts, 388 U.S. 130, 169-170* (WARREN, C. J., concurring in the result), and 172 (BRENNAN, J., dissenting) (1967).

[***LEdHR3B] [3B] [***LEdHR8] [8] [***LEdHR9] [9]By no proper test of reckless disregard was St. Amant's broadcast a reckless publication about a public officer. Nothing referred to by the Louisiana courts indicates an awareness by St. Amant of the probable falsity of Albin's [*733] statement about Thompson. Failure to investigate does not in itself establish bad faith. *New York Times Co.* v. *Sullivan, supra, at 287-288.* St. Amant's mistake about his probable legal liability does not evidence a doubtful mind on his part. That he failed to realize the import of what he broadcast -- and was thus "heedless" of the consequences for Thompson -- is similarly colorless. Closer to the mark are considerations of Albin's reliability. However, the most the state court could say was that there was no evidence in the record of Albin's reputation for veracity, and this fact merely underlines the failure of Thompson's evidence to demonstrate a low community assessment of Albin's trustworthiness or unsatisfactory experience with him by St. Amant.

[***LEdHR3C] [3C]

Other facts in this record support our view. St. Amant made his broadcast in June 1962. He had known Albin since October 1961, when he first met with members of the dissident Teamsters faction. St. Amant testified that he had verified other aspects of Albin's information and that he had affidavits from others. Moreover Albin swore to his answers, first in writing and later in the presence of newsmen. According to Albin, he was prepared to substantiate his charges. St. Amant knew that Albin was engaged in an internal struggle in the union; Albin seemed to St. Amant [**1327] to be placing himself in personal danger by publicly airing the details of the dispute.

[***LEdHR10] [10]Because the state court misunderstood and misapplied the actual malice standard which must be observed in a public official's defamation action, the judgment is reversed and the case remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS concur in the judgment of the Court for the reasons set out in [*734] their concurring opinions in *New York Times Co.* v. *Sullivan, 376 U.S. 254, 293 (1964)*, and *Garrison v. Louisiana, 379 U.S. 64, 79, 80 (1964).*

DISSENT BY: FORTAS

DISSENT

MR. JUSTICE FORTAS, dissenting.

I do not believe that petitioner satisfied the minimal standards of care specified by *New York Times Co.* v. *Sullivan, 376 U.S. 254* [***269] *(1964).* The affidavit that petitioner broadcast contained a seriously libelous statement directed against respondent. Respondent was a public official. He was not petitioner's adversary in the political contest. Petitioner's casual, careless, callous use of the libel cannot be rationalized as resulting from the heat of a campaign. Under *New York Times*, this libel was broadcast by petitioner with "actual malice" -- with reckless disregard of whether it was false or not. The principle of *Curtis Publishing Co.* v. *Butts, 388 U.S. 130 (1967)*, in my opinion, should lead us to affirmance here.

The *First Amendment* is not so fragile that it requires us to immunize this kind of reckless, destructive invasion of the life, even of public officials, heedless of their interests and sensitivities. The *First Amendment* is not a shelter for the character assassinator, whether his action is heedless and reckless or deliberate. The *First Amendment* does not require that we license shotgun attacks on public officials in virtually unlimited open season. The occupation of public officeholder does not forfeit one's membership in the human race. The public official should be subject to severe scrutiny and to free and open criticism. But if he is needlessly, heedlessly, falsely accused of crime, he should have a remedy in law. *New York Times* does not preclude this minimal standard of civilized living.

Petitioner had a duty here to check the reliability of the libelous statement about respondent. If he had made a good-faith check, I would agree that he should be protected [*735] even if the statement were false, because the interest of public officials in their reputation

must endure this degree of assault. But since he made no check, I agree with the Supreme Court of Louisiana that *New York Times* does not prohibit recovery.

I would affirm.

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Am Jur, Libel and Slander (1st ed 79-83, 169)

12 Am Jur Proof of Facts 523, Retraction of Defamatory Statements

US L Ed Digest, Constitutional Law 927.5; Evidence 175, 918

ALR Digests, Constitutional Law 794; Libel and Slander 65, 127

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ALR Quick Index, Libel and Slander

Annotation References:

The Supreme Court and the right of free speech and press. *93 L Ed 1151, 2 L Ed 2d 1706, 11 L Ed 2d 1116, 16 L Ed 2d 1053.*

Libel and slander: who is a public official or otherwise within the federal constitutional rule requiring public officials to show actual malice? *19 ALR3d 1348.*

Constitutional aspects of libel or slander of public officials . *95 ALR2d 1450.*

Doctrine of privilege or fair comment as applicable to misstatements of fact in publication relating to public officer or candidate for office. 110 ALR 412, 150 ALR 358.

Libel and slander: what constitutes actual malice within federal constitutional rule requiring public officials and public figures to show actual malice. *20 ALR3d 988.*

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Caution
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TIME, INC. v. FIRESTONE

No. 74-944.

SUPREME COURT OF THE UNITED STATES

424 U.S. 448; 96 S. Ct. 958; 47 L. Ed. 2d 154; 1976 U.S. LEXIS 26; 1 Media L. Rep. 1665

Argued October 14, 1975
March 2, 1976

PRIOR HISTORY: CERTIORARI TO THE SUPREME COURT OF FLORIDA

SYLLABUS

After respondent had sought separate maintenance, her husband, the scion of a wealthy industrial family, filed a counterclaim for divorce on grounds of extreme cruelty and adultery. The court granted the counterclaim, stating that "neither party is domesticated, within the meaning of that term as used by the Supreme Court of Florida," and that "the marriage should be dissolved." On the basis of newspaper and wire service reports and information from a bureau chief and a "stringer," petitioner published in its magazine an item reporting that the divorce was granted "on grounds of extreme cruelty and adultery." After petitioner had declined to retract, respondent brought this libel action in the state court. A jury verdict for damages against petitioner was ultimately affirmed by the Florida Supreme Court. Petitioner claims that the judgment violates its rights under the *First* and *Fourteenth Amendments*. Held:

1. The standard enunciated in *New York Times Co. v. Sullivan, 376 U.S. 254*, as later extended, which bars media liability for defamation of a public figure absent proof that the defamatory statements were published with knowledge of their falsity or in reckless disregard of the truth, is inapplicable to the facts of this case. Pp. 452-457.

(a) Respondent was not a "public figure," since she did not occupy "[a role] of especial prominence in the affairs of society," and had not been "thrust . . . to the forefront of particular public controversies in order to influence the resolution of the issues involved." *Gertz v. Robert Welch, Inc., 418 U.S. 323, 345*. Pp. 453-455.

(b) The New York Times rule does not automatically extend to all reports of judicial proceedings regardless of whether the party plaintiff in such proceedings is a public figure who might be assumed to "have voluntarily exposed [himself] to increased risk of injury from defamatory falsehood." *Gertz, supra, at 345*. There is no substantial reason why one involved in litigation should forfeit that degree of protection afforded by the law of defamation simply by virtue of being drawn into a courtroom. Pp. 455-457.

2. No finding was ever made by the divorce court that respondent was guilty of adultery as petitioner had reported, and though petitioner contends that it faithfully reproduced the precise meaning of the divorce judgment,

the jury's verdict, upheld on appeal, rejected petitioner's contention that the report was accurate. Pp. 457-459.

3. In a case such as this, *Gertz, supra*, imposes the constitutional limitations that (1) compensatory awards "be supported by competent evidence concerning the injury" and (2) liability cannot be imposed without fault. Since Florida permits damages awards in defamation actions based on elements other than injury to reputation, and there was competent evidence here to permit the jury to assess the amount of such injury, the first of these conditions was satisfied. Pp. 459-461.

4. Since, however, there was no finding of fault on the part of the petitioner in its publication of the defamatory material, the second constitutional limitation imposed by Gertz was not met. Though the trial court's failure to submit the question of fault to the jury does not of itself establish noncompliance with the constitutional requirement, none of the Florida courts that considered this case determined that petitioner was at fault. Pp. 461-464.

305 So.2d 172, vacated and remanded.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, BLACKMUN, and POWELL, JJ., joined. POWELL, J., filed a concurring opinion, in which STEWART, J., joined, post, p. 464. BRENNAN, J., post, p. 471, WHITE, J., post, p. 481, and MARSHALL, J., post, p. 484, filed dissenting opinions. STEVENS, J., took no part in the consideration or decision of the case.

COUNSEL: John H. Pickering argued the cause for petitioner. With him on the briefs were Harold R. Medina, Jr., and William S. Frates.

Edna L. Caruso argued the cause and filed a brief for respondent.

OPINION BY: REHNQUIST

OPINION

[*449] [***160] [**963] MR. JUSTICE REHNQUIST, delivered the opinion of the Court.

Petitioner is the publisher of Time, a weekly news magazine. The Supreme Court of Florida affirmed a [*450] $100,000 libel judgment against petitioner which was based on an item appearing in Time that purported to describe the result of domestic relations litigation between respondent and her husband. We granted certiorari, *421 U.S. 909 (1975)*, to review petitioner's claim that the judgment violates its rights under the *First* and *Fourteenth Amendments to the United States Constitution.*

I

Respondent, Mary Alice Firestone, married Russell Firestone, the scion of one of America's wealthier industrial families, in 1961. In 1964, they separated, and respondent filed a complaint for separate maintenance in the Circuit Court of Palm Beach [***161] County, Fla. Her husband counterclaimed for divorce on grounds of extreme cruelty and adultery. After a lengthy trial the Circuit Court issued a judgment granting the divorce requested by respondent's husband. In relevant part the court's final judgment read: S

"This cause came on for final hearing before the court upon the plaintiff wife's second amended complaint for separate maintenance (alimony unconnected with the causes of divorce), the defendant husband's answer and counterclaim for divorce on grounds of extreme cruelty and adultery, and the wife's answer thereto setting up certain affirmative defenses.

. . . . .

"According to certain testimony in behalf of the defendant, extramarital escapades of the plaintiff were bizarre and of an amatory nature which would have made Dr. Freud's hair curl. Other testimony, in plaintiff's behalf, would indicate that defendant was guilty of bounding from one bed partner to another [*451] with the erotic zest of a satyr. The court is inclined to discount much of this testimony as unreliable. Nevertheless, it is the conclusion and finding of the court that neither party is domesticated, within the [**964] meaning of that term as used by the Supreme Court of Florida.

. . . . .

"In the present case, it is abundantly clear from the evidence of marital discord that neither of the parties has shown the least susceptibility to domestication, and that the marriage should be dissolved.

. . . . . $

"The premises considered, it is thereupon

"ORDERED AND ADJUDGED as follows:

"1. That the equities in this cause are with the defendant; that defendant's counterclaim for divorce be and the same is hereby granted, and the bonds of matrimony which have heretofore existed between the parties are hereby forever dissolved.

. . .

"4. That the defendant shall pay unto the plaintiff the sum of $ 3,000 per month as alimony beginning January 1, 1968, and a like sum on the first day of each and every month thereafter until the death or remarriage of the plaintiff." App. 523-525, 528.

Time's editorial staff, headquartered in New York, was alerted by a wire service report and an account in a New York newspaper to the fact that a judgment had been rendered in the Firestone divorce proceeding. The staff subsequently received further information regarding the Florida decision from Time's Miami bureau chief and from a "stringer" working on a special assignment basis in the Palm Beach area. On the basis of these four sources, Time's staff composed the following item, [*452] which appeared in the magazine's "Milestones" section the following week: S

"DIVORCED. By Russell A. Firestone Jr., 41, heir to the tire fortune: Mary Alice Sullivan Firestone, 32, his third wife; a onetime Palm Beach schoolteacher; on grounds of extreme cruelty and adultery; after six years of marriage, [***162] one son; in West Palm Beach, Fla. The 17-month intermittent trial produced enough testimony of extramarital adventures on both sides, said the judge, 'to make Dr. Freud's hair curl.'"I

Within a few weeks of the publication of this article respondent demanded in writing a retraction from petitioner, alleging that a portion of the article was "false, malicious and defamatory." Petitioner declined to issue the requested retraction. [1]

1 Under Florida law the demand for retraction was a prerequisite for filing a libel action, and permits defendants to limit their potential liability to actual damages by complying with the demand. *Fla. Stat. Ann. §§ 770.01-770.02* (1963).

Respondent then filed this libel action against petitioner in the Florida Circuit Court. Based on a jury verdict for respondent, that court entered judgment against petitioner for $100,000, and after review in both the Florida District Court of Appeal and the Supreme Court of Florida the judgment was ultimately affirmed. *305 So. 2d 172 (1974)*. Petitioner advances several contentions as to why the judgment is contrary to decisions of this Court holding that the *First* and *Fourteenth Amendments of the United States Constitution* limit the authority of state courts to impose liability for damages based on defamation.

II

[***LEdHR1A] [1A] Petitioner initially contends that it cannot be liable for publishing any falsehood defaming respondent unless [*453] it is established that the publication was made "with actual malice," as that term is defined in *New York Times Co. v. Sullivan, 376 U.S. 254 (1964)*. [2] Petitioner advances two arguments in support of this contention: that [**965] respondent is a "public figure" within this Court's decisions extending New York Times to defamation suits brought by such individuals, see, e.g., *Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967)*; and that the Time item constituted a report of a judicial proceeding, a class of subject matter which petitioner claims deserves the protection of the "actual malice" standard even if the story is proved to be defamatorily false or inaccurate. We reject both arguments.

2 [***LEdHR1B] [1B]

The "actual malice" test requires that a plaintiff prove that the defamatory statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not." *376 U.S., at 280*.

[***LEdHR2] [2] [***LEdHR3] [3]In *Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974)*, we have recently further defined the meaning of "public figure" for the purposes of the *First* and *Fourteenth Amendments*: S

"For the most part those who attain this status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of

particular public controversies in order to influence the resolution of the issues involved."I

Respondent did not assume any role of especial prominence in the affairs of society, other than perhaps Palm Beach society, and she did not thrust [***163] herself to the forefront of any particular public controversy in order to influence the resolution of the issues involved in it.

[*454] Petitioner contends that because the Firestone divorce was characterized by the Florida Supreme Court as a "cause celebre," it must have been a public controversy and respondent must be considered a public figure. But in so doing petitioner seeks to equate "public controversy" with all controversies of interest to the public. Were we to accept this reasoning, we would reinstate the doctrine advanced in the plurality opinion in *Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971)*, which concluded that the New York Times privilege should be extended to falsehoods defamatory of private persons whenever the statements concern matters of general or public interest. In Gertz, however, the Court repudiated this position, stating that "extension of the New York Times test proposed by the Rosenbloom plurality would abridge [a] legitimate state interest to a degree that we find unacceptable." *418 U.S., at 346.*

[***LEdHR4A] [4A]Dissolution of a marriage through judicial proceedings is not the sort of "public controversy" referred to in Gertz, even though the marital difficulties of extremely wealthy individuals may be of interest to some portion of the reading public. Nor did respondent freely choose to publicize issues as to the propriety of her married life. She was compelled to go to court by the State in order to obtain legal release from the bonds of matrimony. We have said that in such an instance "[r]esort to the judicial process... is no more voluntary in a realistic sense than that of the defendant called upon to defend his interests in court." *Boddie v. Connecticut, 401 U.S. 371, 376-377 (1971)*. Her actions, both in instituting the litigation and in its conduct, were quite different from those of General Walker in *Curtis Publishing Co., supra.* [3] She assumed no "special prominence [*455] in the resolution of public questions." *Gertz, supra, at 351*. We hold respondent was not a "public figure" for the purpose of determining the constitutional protection [**966] afforded petitioner's report of the factual and legal basis for her divorce.

3 [***LEdHR4B] [4B]

Nor do we think the fact that respondent may have held a few press conferences during the divorce proceedings in an attempt to satisfy inquiring reporters converts her into a "public figure." Such interviews should have had no effect upon the merits of the legal dispute between respondent and her husband or the outcome of that trial, and we do not think it can be assumed that any such purpose was intended. Moreover, there is no indication that she sought to use the press conferences as a vehicle by which to thrust herself to the forefront of some unrelated controversy in order to influence its resolution. See *Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974)*.

[***LEdHR5] [5]For similar reasons we likewise reject petitioner's claim for automatic extension of the New York Times privilege to all reports of judicial proceedings. It is argued that information concerning proceedings in our Nation's courts may have such importance to all citizens as to justify extending special *First Amendment* protection to the press when reporting on such events. We have recently accepted a significantly more confined version of this [***164] argument by holding that the Constitution precludes States from imposing civil liability based upon the publication of truthful information contained in official court records open to public inspection. *Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975)*.

Petitioner would have us extend the reasoning of Cox Broadcasting to safeguard even inaccurate and false statements, at least where "actual malice" has not been established. But its argument proves too much. It may be that all reports of judicial proceedings contain some informational value implicating the *First Amendment*, but recognizing this is little different from labeling all judicial proceedings matters of "public or general interest," as that phrase was used by the plurality [*456] in Rosenbloom. Whatever their general validity, use of such subject-matter classifications to determine the extent of constitutional protection afforded defamatory falsehoods may too often result in an improper balance between the competing interests in this area. It was our recognition and rejection of this weakness in the Rosenbloom test which led us in Gertz to eschew a subject-matter test for one focusing upon the character of the defamation plaintiff. See *418 U.S., at 344-346*. By confining inquiry to whether a plaintiff is a public officer

or a public figure who might be assumed to "have voluntarily exposed [himself] to increased risk of injury from defamatory falsehood," we sought a more appropriate accommodation between the public's interest in an uninhibited press and its equally compelling need for judicial redress of libelous utterances. Cf. *Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).*

Presumptively erecting the New York Times barrier against all plaintiffs seeking to recover for injuries from defamatory falsehoods published in what are alleged to be reports of judicial proceedings would effect substantial depreciation of the individual's interest in protection from such harm, without any convincing assurance that such a sacrifice is required under the *First Amendment.* And in some instances such an undiscriminating approach might achieve results directly at odds with the constitutional balance intended. Indeed, the article upon which the Gertz libel action was based purported to be a report on the murder trial of a Chicago police officer See *418 U.S., at 325-326.* Our decision in that case should make it clear that no such blanket privilege for reports of judicial proceedings is to be found in the Constitution.

[***LEdHR6] [6] [***LEdHR7] [7]It may be argued that there is still room for application of the New York Times protections to more narrowly [*457] focused reports of what actually transpires in the courtroom. But even so narrowed, the suggested privilege is simply too broad. Imposing upon the law of private defamation the rather drastic limitations worked by New York Times cannot be justified by generalized references to the public interest in reports of judicial proceedings. The details of many, if not most, courtroom battles would add almost nothing toward advancing the uninhibited debate on public issues thought to provide principal support for the decision in New York Times. See *376 U.S., at 270*; [***165] cf. *Rosenblatt v. Baer, 383 U.S. 75, 86 (1966).* And while participants in some litigation may be legitimate "public figures," either generally or for the limited purpose of that litigation, [**967] the majority will more likely resemble respondent, drawn into a public forum largely against their will in order to attempt to obtain the only redress available to them or to defend themselves against actions brought by the State or by others. There appears little reason why these individuals should substantially forfeit that degree of protection which the law of defamation would otherwise afford them simply by virtue of their being drawn into a courtroom. The public interest in accurate reports of judicial proceedings is substantially protected by *Cox Broadcasting Co., supra.* As to inaccurate and defamatory reports of facts, matters deserving no *First Amendment* protection, see *418 U.S., at 340,* we think Gertz provides an adequate safeguard for the constitutionally protected interests of the press and affords it a tolerable margin for error by requiring some type of fault.

III

[***LEdHR8] [8]Petitioner has urged throughout this litigation that it could not be held liable for publication of the "Milestones" item because its report of respondent's divorce [*458] was factually correct. In its view the Time article faithfully reproduced the precise meaning of the divorce judgment. But this issue was submitted to the jury under an instruction intended to implement Florida's limited privilege for accurate reports of judicial proceedings. App. 509; see *305 So. 2d, at 177.* By returning a verdict for respondent the jury necessarily found that the identity of meaning which petitioner claims does not exist even for laymen. The Supreme Court of Florida upheld this finding on appeal, rejecting petitioner's contention that its report was accurate as a matter of law. Because demonstration that an article was true would seem to preclude finding the publisher at fault, see *Cox Broadcasting Co., 420 U.S., at 498-500* (POWELL, J., concurring), we have examined the predicate for petitioner's contention. We believe the Florida courts properly could have found the "Milestones" item to be false.

For petitioner's report to have been accurate, the divorce granted Russell Firestone must have been based on a finding by the divorce court that his wife had committed extreme cruelty toward him and that she had been guilty of adultery. This is indisputably what petitioner reported in its "Milestones" item, but it is equally indisputable that these were not the facts. Russell Firestone alleged in his counterclaim that respondent had been guilty of adultery, but the divorce court never made any such finding. Its judgment provided that Russell Firestone's "counterclaim for divorce be and the same is hereby granted," but did not specify that the basis for the judgment was either of the two grounds alleged in the counterclaim. The Supreme Court of Florida on appeal concluded that the ground actually relied upon by the divorce court was "lack of domestication of the parties," a ground not theretofore recognized by Florida law. The

Supreme Court nonetheless affirmed the judgment dissolving the bonds of [***166] matrimony [*459] because the record contained sufficient evidence to establish the ground of extreme cruelty. *Firestone v. Firestone, 263 So. 2d 223, 225 (1972).*

[***LEdHR9A] [9A] [***LEdHR10] [10]Petitioner may well argue that the meaning of the trial court's decree was unclear, [4] but this does not license it to choose from among several conceivable interpretations the one most damaging to respondent. Having chosen to follow this tack, [5] petitioner [**968] must be able to establish not merely that the item reported was a conceivable or plausible interpretation of the decree, but that the item was factually correct. We believe there is ample support for the jury's conclusion, affirmed by the Supreme Court of Florida, that this was not the case. There was, therefore, sufficient basis for imposing liability upon petitioner if the constitutional limitations we announced in Gertz have been satisfied. These are a prohibition against imposing liability without fault, *418 U.S., at 347*, and the requirement that compensatory awards "be supported by competent evidence concerning the injury." *Id., at 350.*

4 [***LEdHR9B] [9B]

Petitioner is incorrect in arguing that a rational interpretation of an ambiguous document is constitutionally protected under our decision in *Time, Inc. v. Pape, 401 U.S. 279 (1971).* There we were applying the New York Times standard to test whether the defendant had acted in reckless disregard of the truth. *Id., at 292.* But as we have concluded that the publication in this case need not be tested against the "actual malice" standard, Pape is of no assistance to petitioner.

5 In fact, it appears that none of petitioner's employees actually saw the decree prior to publication of the "Milestones" article. But we do not think this can affect the extent of constitutional protection afforded the statement. Moreover, petitioner has maintained throughout that it would have published an identical statement if its editorial staff had had an opportunity to peruse the judgment prior to their publication deadline, and has consistently contended that its article was true when compared to the words of that judgment.

[*460] [***LEdHR11] [11] [***LEdHR12] [12]As to the latter requirement little difficulty appears. Petitioner has argued that because respondent withdrew her claim for damages to reputation on the eve of trial, there could be no recovery consistent with Gertz. Petitioner's theory seems to be that the only compensable injury in a defamation action is that which may be done to one's reputation, and that claims not predicated upon such injury are by definition not actions for defamation. But Florida has obviously decided to permit recovery for other injuries without regard to measuring the effect the falsehood may have had upon a plaintiff's reputation. This does not transform the action into something other than an action for defamation as that term is meant in Gertz. In that opinion we made it clear that States could base awards on elements other than injury to reputation, specifically listing "personal humiliation, and mental anguish and suffering" as examples of injuries which might be compensated consistently with the Constitution upon a showing of fault. Because respondent has decided to forgo recovery for injury to her reputation, she is not prevented from obtaining compensation for such other damages that a defamatory falsehood may have caused her.

[***LEdHR13] [13]The trial court charged, consistently with Gertz, that the jury should award respondent compensatory damages in "an amount of [***167] money that will fairly and adequately compensate her for such damages," and further cautioned that "[i]t is only damages which are a direct and natural result of the alleged libel which may be recovered." App. 509. There was competent evidence introduced to permit the jury to assess the amount of injury. Several witnesses 6 testified to the extent of respondent's [*461] anxiety and concern over Time's inaccurately reporting that she had been found guilty of adultery, and she herself took the stand to elaborate on her fears that her young son would be adversely affected by this falsehood when he grew older. The jury decided these injuries should be compensated by an award of $100,000. We have no warrant for re-examining this determination. Cf. *Lincoln v. Power, 151 U.S. 436 (1894).*

6 These included respondent's minister, her attorney in the divorce proceedings, plus several friends and neighbors, one of whom was a physician who testified to having to administer a sedative to respondent in an attempt to reduce discomfort wrought by her worrying about the article.

IV

[***LEdHR14A] [14A]Gertz established, however, that not only must there be evidence to support an award of compensatory damages, there must also be evidence of some fault on the part of a defendant charged with publishing defamatory material. No question of fault was submitted to the jury in this case, because under Florida law the only findings required for determination of liability were whether the article was defamatory, whether [**969] it was true, and whether the defamation, if any, caused respondent harm.

[***LEdHR15] [15] [***LEdHR16] [16] The failure to submit the question of fault to the jury does not of itself establish noncompliance with the constitutional requirements established in Gertz, however. Nothing in the Constitution requires that assessment of fault in a civil case tried in a state court be made by a jury, nor is there any prohibition against such a finding being made in the first instance by an appellate, rather than a trial, court. The *First* and *Fourteenth Amendments* do not impose upon the States any limitations as to how, within their own judicial systems, factfinding tasks shall be allocated. If we were satisfied that one of the Florida courts which considered this case had supportably ascertained petitioner [*462] was at fault, we would be required to affirm the judgment below.

But the only alternative source of such a finding, given that the issue was not submitted to the jury, is the opinion of the Supreme Court of Florida. That opinion appears to proceed generally on the assumption that a showing of fault was not required, [7] but then in the penultimate paragraph it recites:

[***168] "Furthermore, this erroneous reporting is clear and convincing evidence of the negligence in certain segments of the news media in gathering the news. *Gertz v. Welch, Inc., supra.* Pursuant to Florida law in effect at the time of the divorce judgment (*Section 61.08, Florida Statutes*), a wife found guilty of adultery could not be awarded alimony. Since petitioner had been awarded alimony, she had not been found guilty of adultery nor had the [*463] divorce been granted on the ground of adultery. A careful examination of the final decree prior to publication would have clearly demonstrated that the divorce had been granted on the grounds of extreme cruelty, and thus the wife would have been saved the humiliation of being accused of adultery in a nationwide magazine. This is a flagrant example of 'journalistic negligence.'" *305 So. 2d, at 178.*I

7 After reiterating its conclusion that the article was false, the Florida court noted that falsely accusing a woman of adultery is libelous per se and normally actionable without proof of damages. The court then recognized that our opinion in Gertz necessarily displaced this presumption of damages but ruled that the trial court's instruction was consistent with Gertz and that there was evidence to support the jury's verdict -- conclusions with which we have agreed. The court went on to reject a claim of privilege under state law, pointing out that the privilege shielded only "fair and accurate" reports and the jury had resolved these issues against petitioner. The court appears to have concluded its analysis of petitioner's legal claims with this statement, which immediately precedes the paragraph set out in the text:

"Careful examination and consideration of the record discloses that the judgment of the trial court is correct and should have been affirmed on appeal to the District Court." *305 So. 2d, at 177-178.*

There is nothing in the court's opinion which appears to make any reference to the relevance of some concept of fault in determining petitioner's liability.

[***LEdHR17] [17]It may be argued that this is sufficient indication the court found petitioner at fault within the meaning of Gertz. Nothing in that decision or in the *First* or *Fourteenth Amendment* requires that in a libel action an appellate court treat in detail by written opinion all contentions of the parties, and if the jury or trial judge had found fault in fact, we would be quite willing to read the quoted passage as affirming that conclusion. But without some finding of fault by the judge or jury in the Circuit Court, we would have to attribute to the Supreme Court of Florida from the quoted language not merely an intention to affirm the finding of the lower court, but an intention to find such a fact in the first instance.

[***LEdHR18] [18]Even where a question of fact may have constitutional significance, we normally accord findings of state courts deference in reviewing

constitutional claims here. See, e.g., *Lyons v. Oklahoma, 322 U.S. 596, 602-603 (1944)*; *Gallegos v. Nebraska, 342 U.S. 55, 60-61* [**970] *(1951)* (opinion of Reed, J.). But that deference is predicated on our belief that at some point in the state proceedings some factfinder has made a conscious determination of the existence or nonexistence of the critical fact. Here the record before us affords no basis for such a conclusion.

[***LEdHR14B] [14B]It may well be that petitioner's account in its "Milestones" section was the product of some fault on its part, [*464] and that the libel judgment against it was, therefore, entirely consistent with Gertz. But in the absence of a finding in some element of the state-court system that there was fault, we are not inclined to canvass the record to make such a determination in the first instance. Cf. *Rosenblatt v. Baer, 383 U.S., at 87-88*. Accordingly, the judgment of the Supreme Court of Florida is vacated and the case remanded for further proceedings not inconsistent with this opinion.

So ordered.

MR. JUSTICE STEVENS took no part in the consideration or decision of this case.

CONCUR BY: POWELL

CONCUR

[***169] MR. JUSTICE POWELL, with whom MR. JUSTICE STEWART joins, concurring.

A clear majority of the Court adheres to the principles of *Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)*. But it is evident from the variety of views expressed that perceptions differ as to the proper application of such principles to this bizarre case. In order to avoid the appearance of fragmentation of the Court on the basic principles involved, I join the opinion of the Court. I add this concurrence to state my reaction to the record presented for our review.

In Gertz we held that "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual." *Id., at 347*. Thus, while a State may elect to hold a publisher to a lesser duty of care, [1] there is no *First Amendment* constraint against [*465] allowing recovery upon proof of negligence. The applicability of such a fault standard was expressly limited to circumstances where, as here, "the substance of the defamatory statement 'makes substantial danger to reputation apparent.'" [2] *Id., at 348*, quoting *Curtis Publishing Co. v. Butts, 388 U.S. 130, 155 (1967)*. By requiring a showing of fault the Court in Gertz sought to shield the press and broadcast media from a rule of strict liability that could lead to intolerable self-censorship and at the same time recognize the legitimate state interest in compensating private individuals for wrongful injury from defamatory falsehoods.

1 A State, if it elected to do so, could require proof of gross negligence before holding a publisher or broadcaster liable for defamation. In Gertz, we concluded "that the State should retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual." *418 U.S., at 345-346*.

2 In amplification of this limitation, we referred to the type of "factual misstatement whose content [does] not warn a reasonably prudent editor or broadcaster of its defamatory potential." *id., at 348*.

In one paragraph near the end of its opinion, the Supreme Court of Florida cited Gertz in concluding that Time was guilty of "journalistic negligence." But, as the opinion of the Court recognizes, ante, at 462 n. 7, and 463, it is not evident from this single paragraph that any type of fault standard was in fact applied. Assuming that Florida now will apply a negligence standard in cases of this kind, the ultimate question here is whether Time exercised due care under the circumstances: Did Time exercise the reasonably prudent care that a State [**971] may constitutionally demand of a publisher or broadcaster prior to a publication whose content reveals its defamatory potential?

The answer to this question depends upon a careful consideration of all the relevant evidence concerning Time's actions prior to the publication of the [*466] "Milestones" article. But in its conclusory paragraph finding negligence, the Supreme Court of Florida mentioned only the provision [***170] of Florida law that proscribed an award of alimony to a wife found guilty of adultery, arguing that the award of alimony to respondent clearly demonstrated that the divorce was

granted on other grounds. There is no recognition in the opinion of the ambiguity of the divorce decree and no discussion of any of the efforts made by Time to verify the accuracy of its news report. Nor was there any weighing of the evidence to determine whether there was actionable negligence by Time under the Gertz standard. [3]

> 3 The absence of any assessment of fault under the Gertz standard by the Supreme Court of Florida is fatal here because there was no such finding at any other level of judgment in this proceeding. Ante, at 461-463, and n. 7.

There was substantial evidence, much of it uncontradicted, that the editors of Time exercised considerable care in checking the accuracy of the story prior to its publication. The "Milestones" item appeared in the December 22, 1967, issue of Time. This issue went to press on Saturday, December 16, the day after the Circuit Court rendered its decision at about 4:30 in the afternoon. The evening of the 15th the Time editorial staff in New York received an Associated Press dispatch stating that Russell A. Firestone, Jr., had been granted a divorce from his third wife, whom "he had accused of adultery and extreme cruelty." Later that same evening, Time received the New York Daily News edition for December 16, which carried a special bulletin substantially to the same effect as the AP dispatch.

On the morning of December 16, in response to an inquiry sent to its Miami bureau, Time's New York office received a dispatch from the head of that bureau quoting excerpts from the Circuit Court's opinion that [*467] strongly suggested adultery on the part of both parties. [4] Later that day the editorial staff received a message from Time's Palm Beach "stringer" that read, in part: "The technical grounds for divorce according to Joseph Farrish [sic], Jr., attorney for Mary Alice Firestone, were given as extreme cruelty and adultry [sic]." App. 532. The stringer's dispatch also included several quotations from the Circuit Court opinion. [5] At trial the senior editor testified that although no member of the New York editorial staff had read the Circuit Court's opinion, he had believed that both the stringer and the chief of Time's Miami bureau had read it.

> 4 The excerpts included: "'According to certain testimony in behalf of the defendant [husband], extra marital escapades of the plaintiff [wife] were bizarre and of an amatory nature which would have made Dr. Freud's hair curl. Other testimony, in the plaintiff's behalf, would indicate that the defendant was guilty of bounding from one bed partner to another with the erotic zest of a satyr.'" App. 544.
>
> 5 Based on these news items and dispatches, the Time editorial team, consisting of a researcher, writer, and senior editor in charge of the "Milestones" section of the magazine, wrote, edited, and checked the article for accuracy. At trial they testified as to their complete belief in the truth of the news item at the time of publication.

The opaqueness of the Circuit Court's decree is also a factor to be considered in assessing whether Time was guilty of actionable fault under the Gertz standard. Although it appears that neither the head of the Miami bureau nor the stringer personally read the opinion or order, [***171] the stringer testified at trial that respondent's attorney Farish and others read him portions of the decree over the telephone before he filed his dispatch with Time. [6] The [**972] record does not reveal whether [*468] the limited portions of the decree that shed light on the grounds for the granting of the divorce were read to the stringer. [7] But the ambiguity of the divorce decree may well have contributed to the stringer's view, and hence the Time editorial staff's conclusion, that a ground for the divorce was adultery by respondent.

> 6 Several hours after filing his dispatch, the stringer spoke with the divorce judge by telephone. According to testimony of the stringer at trial the divorce judge read him portions of the decree, and none of this information was inconsistent with that contained in his dispatch to Time; otherwise, he would have alerted Time's New York office immediately.
>
> 7 Time did not consider the stringer to be an employee. He worked for Time part time and was compensated at an hourly rate, although he was guaranteed a minimum amount of work each year. In this case, he was contacted by the chief of the Miami bureau and requested to investigate the Firestone divorce decree. There is thus a question whether the fault, if any, of the stringer in not personally reading the entire opinion and order, is even a factor that may be considered in assessing whether there was actionable fault by Time under Gertz. Cf. *Cantrell v. Forest City Publishing*

Co., 419 U.S. 245, 253-254 (1974).

However one may characterize it, the Circuit Court decision was hardly a model of clarity. Its opening sentence was as follows: S

"This cause came on for final hearing before the court upon the plaintiff wife's second amended complaint for separate maintenance (alimony unconnected with the causes of divorce), the defendant husband's answer and counterclaim for divorce on grounds of extreme cruelty and adultery, and the wife's answer thereto setting up certain affirmative defenses." App. 523.I

After commenting on the conflicting testimony as to respondent's "extra marital escapades" and her husband's "bounding from one bed partner to another," the opinion states that "it is the conclusion and finding of the court that neither party is domesticated...." Finally, the Circuit Court "ORDERED AND ADJUDGED":

"That the equities in this cause are with the [*469] defendant; that defendant's counterclaim for divorce be and the same is hereby granted, and the bonds of matrimony which have heretofore existed between the parties are hereby forever dissolved." App. 528.

The remaining paragraphs in the order portion of the decision relate to child custody and support, disposition of certain property, attorney's fees, and the award of $3,000 per month to the wife (respondent) as alimony. There is no reference whatever in the "order" portion of the decision either to "extreme cruelty" or "adultery," the only grounds relied upon by the husband. But the divorce was granted to him following an express finding "that the equities... are with the defendant [the husband]."

Thus, on the face of the opinion itself, the husband had counterclaimed for divorce on the grounds of extreme cruelty and adultery, and the court had found the equities to be with him and had granted his counterclaim [***172] for divorce. Apart from the awarding of alimony to the wife there is no indication, either in the opinion or accompanying order, that the husband's counterclaim was not granted on both of the grounds asserted. This may be a redundant reading, as either ground would have sufficed. But the opinion that preceded the order was full of talk of adultery and made no explicit reference to any other type of cruelty. In these circumstances, the decision of the Circuit Court may have been sufficiently ambiguous to have caused reasonably prudent newsmen to read it as granting divorce on the ground of adultery.

As I join the opinion of the Court remanding this case, it is unnecessary to decide whether the foregoing establishes as a matter of law that Time exercised the requisite care under the circumstances. Nor have I undertaken to identify all of the evidence that may be relevant or to [*470] point out conflicts that arguably have been resolved against Time by the jury. My point in writing is to emphasize that, against the background of a notorious divorce case, see *Curtis Publishing Co., 388 U.S., at 158-159*, [8] [**973] and a decree that invited misunderstanding, there was substantial evidence supportive of Time's defense that it was not guilty of actionable negligence. At the very least the jury or court assessing liability in this case should have weighed these factors and this evidence before reaching a judgment. [9] There is no indication in the record before us that this was done in accordance with Gertz. [10]

8 In its first opinion remanding the case to the District Court of Appeal, after referring to the general prominence of the Firestones, the Supreme Court of Florida indicated that "their marital difficulties were equally well known; and the charges and countercharges of meretriciousness, flowing from both sides of the controversy, made their divorce action a veritable cause celebre in social circles across the country." *271 So. 2d 745, 751 (1972)*. The District Court of Appeal similarly observed that in part due to the sensational and colorful testimony the 17-month divorce trial had been the object of national news coverage. *254 So. 2d 386, 389 (1971)*. The reports Time received that the decree was granted on the ground of adultery therefore were consistent with the well-publicized trial revelations.

9 Indeed, I agree with the view expressed by MR. JUSTICE MARSHALL in his dissenting opinion: Unless there exists some basis for a finding of fault other than that given by the Supreme Court of Florida there can be no liability.

10 The Florida District Court of Appeal, on the second appeal to it, reversed a judgment for respondent. In doing so, it applied the New York Times "actual malice" standard, but added:

"Nowhere was there proof Time was even negligent, much less intentionally false or in reckless disregard of the truth." *254 So. 2d, at 390*. A problem infecting the various decisions in the Florida courts is the understandable uncertainty as to exactly what standard should be applied. This case was in litigation several years before Gertz was decided.

DISSENT BY: BRENNAN; WHITE; MARSHALL [*471]

DISSENT

MR. JUSTICE BRENNAN, dissenting.

In my view, the question presented by this case is the degree of protection commanded by the *First Amendment's* free expression guarantee where it is sought to hold a publisher liable under state defamation laws for erroneously reporting the results of a public judicial proceeding.

I

In a series of cases beginning with *New York Times Co. v. Sullivan, 376 U.S. 254 (1964)*, this Court [***173] has held that the laws of libel and defamation, no less than other legal modes of restraint on the freedoms of speech and press, are subject to constitutional scrutiny under the *First Amendment*. The Court has emphasized that the central meaning of the free expression guarantee is that the body politic of this Nation shall be entitled to the communications necessary for self-governance, and that to place restraints on the exercise of expression is to deny the instrumental means required in order that the citizenry exercise that ultimate sovereignty reposed in its collective judgment by the Constitution. [1] Accordingly, we have held that laws governing harm incurred by individuals through defamation or invasion of privacy, although directed to the worthy objective of ensuring the "essential dignity and worth of every human being" necessary to a civilized society, *Rosenblatt v. Baer, 383 U.S. 75, 92 (1966)* (STEWART, J., concurring), must be measured and limited by constitutional constraints [*472] assuring the maintenance and well-being of the system of free expression. Although "calculated falsehood" is no part of the expression protected by the central meaning of the *First Amendment, Garrison v. Louisiana, 379 U.S. 64, 75 (1964)*, error and misstatement is recognized as inevitable in any scheme of truly free expression and debate. *New York Times, supra, at 271-272*. Therefore, in order to avoid the self-censorship that [**974] would necessarily accompany strict or simple fault liability for erroneous statements, rules governing liability for injury to reputation are required to allow an adequate margin for error -- protecting some misstatements so that the "freedoms of expression... have the 'breathing space' that they 'need... to survive.'" Ibid. "[T]o insure the ascertainment and publication of the truth about public affairs, it is essential that the *First Amendment* protect some erroneous publications as well as true ones." *St. Amant v. Thompson, 390 U.S. 727, 732 (1968)*. For this reason, New York Times held that liability for defamation of a public official may not be imposed in the absence of proof of actual malice on the part of the person making the erroneous statement. *376 U.S., at 279-280*. [2]

1 See Kalven, The New York Times Case: A Note on "The Central Meaning of the *First Amendment*," 1964 Sup. Ct. Rev. 191; Meiklejohn, The *First Amendment* Is An Absolute, 1961 Sup. Ct. Rev. 245. See also Bloustein, The *First Amendment* and Privacy: The Supreme Court Justice and the Philosopher, 28 Rutgers L. Rev. 41 (1974); Meiklejohn, Public Speech in the Supreme Court Since New York Times v. Sullivan, 26 Syracuse L. Rev. 819 (1975).

2 The protection of the actual-malice test extends to erroneous statements that in any way "might touch on... [the] fitness for office" of a public official, *Garrison v. Louisiana, 379 U.S. 64, 77 (1964)*, or a candidate for public office, *Monitor Patriot Co. v. Roy, 401 U.S. 265, 274 (1971)*. The actual-malice standard has been applied "at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs," *Rosenblatt v. Baer, 383 U.S. 75, 85 (1966)*, and further to "public figures" who are "intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large." *Curtis Publishing Co. v. Butts, 388 U.S. 130, 164 (1967)* (Warren, C.J., concurring in result).

As an erroneous judgment of liability is, in

> view of the *First Amendment* values at stake, of more serious concern than an erroneous judgment in the opposite direction, *Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 50 (1971)*, the Court has held that actual malice must be demonstrated with "convincing clarity." *New York Times, 376 U.S., at 285-286.* The actual-malice standard requires a showing that the erroneous statements were made in knowing or reckless disregard of their falsity, *id., at 280*, and has been otherwise defined as requiring a showing that the statements were made by a person who in fact was entertaining "serious doubts" as to their truth. *St. Amant v. Thompson, 390 U.S. 727, 731 (1968).*

[*473] Identical [***174] considerations led the Court last Term in *Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975)*, to hold that the *First Amendment* commands an absolute privilege to truthfully report the contents of public records reflecting the subject matter of judicial proceedings. Recognizing the possibility of injury to legitimate privacy interests of persons affected by such proceedings, the Court was nevertheless constrained in light of the strong *First Amendment* values involved to conclude that no liability whatever could be imposed by the State for reports damaging to those concerns. Following the reasoning of New York Times and its progeny, the Court in Cox Broadcasting noted: S

"[In] a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations. Great responsibility is accordingly placed upon the news media to report fully and accurately the proceedings of government, and official records and documents open to the public are the basic data of governmental operations. Without the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government [*474] generally. With respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice....

. . . . .

"... Public records by their very nature are of interest to those concerned [**975] with the administration of government, and a public benefit is performed by the reporting of the true contents of the records by the media. The freedom of the press to publish that information appears to us to be of critical importance to our type of government in which the citizenry is the final judge of the proper conduct of public business." *420 U.S., at 491-492, 495.*I

Crucial to the holding in Cox Broadcasting was the determination that a "reasonable man" standard for imposing liability for invasion of privacy interests is simply inadequate to the task of safeguarding against "timidity and self-censorship" in reporting judicial proceedings. *Id., at 496.* Clearly, the inadequacy of any such standard is no less in the related area of liability for defamation [***175] resulting from inadvertent error in reporting such proceedings.

II

It is true, of course, that the Court in *Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)*, cut back on the scope of application of the New York Times privilege as it had evolved through the plurality opinion in *Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971).* Rosenbloom had held the New York Times privilege applicable to "all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous." *403 U.S., at 44.* But in light of the Court's perception [*475] of an altered balance between the conflicting values at stake where the person defamed is in some sense a "private individual," *Gertz, supra, at 347, 349-350*, held *First Amendment* interests adequately protected in such circumstances so long as defamation liability is restricted to a requirement of "fault" and proof of "actual injury" resulting from the claimed defamation. [3] *418 U.S.,* [*476] *at 349-350.* However, the extension of the relaxed standard of Gertz to news reporting of events transpiring in and decisions arising out of public judicial proceedings is unwarranted by the terms of Gertz itself, is contrary to other well-established precedents of this Court and, most importantly, savages the cherished values encased in the *First Amendment.*

> 3 In this case, the $100,000 damage award was premised entirely on the injury of mental pain and anguish. All claims as to injury to reputation were withdrawn prior to trial, and no evidence concerning damage to reputation was presented at trial. (Indeed, it appears that petitioner was

affirmatively precluded from offering evidence to refute any possible jury assumption in this regard by a pretrial order granting "Plaintiff's Motion to Limit Testimony," App. 77.) It seems clear that by allowing this type of recovery the State has subverted whatever protective influence the "actual injury" stricture may possess. Gertz would, of course, allow for an award of damages for such injury after proof of injury to reputation. *418 U.S., at 349-350.* But to allow such damages without proof "by competent evidence" of any other "actual injury" is to do nothing less than return to the old rule of presumed damages supposedly outlawed by Gertz in instances where the New York Times standard is not met. *418 U.S., at 349.* See Anderson, Libel and Press Self-Censorship, 53 Tex. L. Rev. 422, 472-473 (1975); Eaton, The American Law of Defamation through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer, 61 Va. L. Rev. 1349, 1436-1437 (1975). The result is clearly to invite "gratuitous awards of money damages far in excess of any actual injury" and jury punishment of "unpopular opinion rather than [compensation to] individuals for injury sustained by the publication of a false fact." *Gertz, supra, at 349.*

Furthermore, the allowance of damages for mental suffering alone will completely abrogate the use of summary judgment procedures in defamation litigation. Cf. Anderson, supra, at 469 n. 218. The use of such summary procedures may be a critical factor enabling publishers to avoid large litigation expenses in marginal and frivolous defamation suits. The specter of such expenses may be as potent a force for self-censorship as any threat of an ultimate damages award. See generally ibid.

There is no indication in Gertz of any intention to overrule the Rosenbloom decision [**976] on its facts. Confined to those facts, Rosenbloom holds that in instances of erroneous reporting of the public actions of public officials, the New York Times actual-malice standard must be met before liability for defamation may be imposed in favor of persons affected by those actions. Although [***176] Gertz clearly altered the broader rationale of Rosenbloom, until the Court's decision today it could not have been supposed that Rosenbloom did not remain the law roughly to the extent of my Brother WHITE'S concurring statement therein:

"[I]n defamation actions, absent actual malice as defined in New York Times Co. v. Sullivan, the *First Amendment* gives the press and the broadcast media a privilege to report and comment upon the official actions of public servants in full detail, with no requirement that the reputation or the privacy of an individual involved in or affected by the official action be spared from public view." *403 U.S., at 62.* [4]I

4 Cf. Anderson, supra, n. 3, at 450-451, concluding that the Gertz opinion suggests a "category of involuntary public figures" roughly equivalent to "[individuals] involved in or affected by... official action" as defined by my Brother WHITE in *Rosenbloom, 403 U.S., at 62.*

At stake in the present case is the ability of the press to report to the citizenry the events transpiring in the Nation's judicial systems. There is simply no meaningful [*477] or constitutionally adequate way to report such events without reference to those persons and transactions that form the subject matter in controversy. 5 This Court has long held:

"A trial is a public event. What transpires in the court room is public property.... Those who see and hear what transpired can report it with impunity. There is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it." *Craig v. Harney, 331 U.S. 367, 374 (1947).* [6]

The Court has recognized that with regard to the judiciary, no less than other areas of government, the press performs an indispensable role by "subjecting the... judicial processes to extensive public scrutiny and criticism." *Sheppard v. Maxwell, 384 U.S. 333, 350 (1966).* And it is critical that the judicial processes be open to such scrutiny and criticism, for, as the Court has noted in the specific context of labor disputes, the more acute public controversies are, "the more likely it is that in some aspect they will get into court." *Bridges v. California, 314 U.S. 252, 268-269 (1941).* [7] Indeed, slight [*478] reflection is [***177] needed to observe the insistent and complex interaction between controversial [**977] judicial proceedings and popular impressions thereof and fundamental legal and political changes in the Nation throughout the 200 years of

evolution of our political system. With the judiciary as with all other aspects of government, the *First Amendment* guarantees to the people of this Nation that they shall retain the necessary means of control over their institutions that might in the alternative grow remote, insensitive, and finally acquisitive of those attributes of sovereignty not delegated by the Constitution. [8]

5 Cf. *Rosenbloom v. Metromedia, Inc., supra, at 61* (WHITE, J., concurring):

"Discussion of the conduct of public officials cannot... be subjected to artificial limitations designed to protect others involved in an episode with officials from unfavorable publicity. Such limitations would deprive the public of full information about the official action that took place."

6 Craig also refutes any contention that private civil litigation is somehow different in this respect. *331 U.S., at 378.*

7 An early and sympathetic observer of our Nation's political system commented:

"The judicial organization of the United States is the institution which a stranger has the greatest difficulty in understanding. He hears the authority of a judge invoked in the political occurrences of every day, and he naturally concludes that in the United States the judges are important political functionaries; nevertheless, when he examines the nature of the tribunals, they offer at the first glance nothing that is contrary to the usual habits and privileges of those bodies; and the magistrates seem to him to interfere in public affairs only by chance, but by a chance that recurs every day.

. . . . .

"Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question." 1 A. de Tocqueville, Democracy in America 98, 280 (P. Bradley ed. 1948).

8 Even those who would narrowly confine the central meaning of the *First Amendment* to "explicitly political speech" recognize that this must extend to all speech "concerned with governmental behavior, policy or personnel, whether the governmental unit involved is executive, legislative, judicial or administrative." Bork, Neutral Principles and Some *First Amendment* Problems, 47 Ind. L.J. 1, 27-28 (1971).

Also no less true than in other areas of government, error in reporting and debate concerning the judicial process is inevitable. Indeed, in view of the complexities of that process and its unfamiliarity to the laymen [*479] who report it, the probability of inadvertent error may be substantially greater.[9]

9 The difficulties encountered by laymen attempting to report in summarized form the results of judicial proceedings are surely illustrated in the instant case. Respondent's husband in counterclaiming for divorce had alleged grounds of "extreme cruelty and adultery," a fact reported in the subsequent judicial opinion. That opinion went on to state:

"According to certain testimony in behalf of the defendant, extra marital escapades of the plaintiff were bizarre and of an amatory nature which would have made Dr. Freud's hair curl. Other testimony, in plaintiff's behalf, would indicate that defendant was guilty of bounding from one bed partner to another with the erotic zest of a satyr. The court is inclined to discount much of this testimony as unreliable. Nevertheless, it is the conclusion and finding of the court that neither party is domesticated, within the meaning of that term as used by the Supreme Court of Florida in the case of *Chesnut v. Chesnut, 33 So. 2d 730,* where the court, in holding that a divorce rather than separate maintenance should be granted, said:

"'The big trouble was total incapacity on the part of either for domestication. Seventy-five per cent of successful marriage depends on tact to cushion and bypass domestic frictions. It is much better than meeting them head on and bearing the scars they leave. When the bride and the groom are both devoid of a yen for domestication, the marital bark puts out to sea with its jib pointed to the rocks.... We think the record reveals a complete allergy to the give and take essential to successful marriage.'

. . . . .

"In the present case, it is abundantly clear from the evidence of marital discord that neither of the parties has shown the least susceptibility to domestication, and that the marriage should be dissolved.

. . . . .

"The premises considered, it is thereupon

"ORDERED AND ADJUDGED as follows:

"1. That the equities in this cause are with the defendant; that defendant's counterclaim for divorce be and the same is hereby granted, and the bonds of matrimony which have heretofore existed between the parties are hereby forever dissolved." App. 523-529.

The Florida Supreme Court in the instant action found the fault required by *Gertz, 418 U.S., at 347*, to be present in the record by virtue of the fact that

"[p]ursuant to Florida law in effect at the time of the divorce judgment... a wife found guilty of adultery could not be awarded alimony. Since petitioner had been awarded alimony, she had not been found guilty of adultery nor had the divorce been granted on the ground of adultery. A careful examination of the final decree prior to publication would have clearly demonstrated that the divorce had been granted on the grounds of extreme cruelty...." *305 So. 2d 172, 178 (1974).*

Surely the threat of press self-censorship in reporting judicial proceedings is obvious if liability is to be imposed on the basis of such "fault." Indeed, the impossibility of assuring against such errors in reporting is manifested by the fact that the same Florida Supreme Court, in reviewing the judgment of divorce some two and one-half years previous to the above-quoted statement, had found the divorce to have been granted by the trial judge on the erroneous grounds of "lack of domestication" rather than for either extreme cruelty or adultery. *Firstone v. Firstone, 263 So. 2d 223 (1972).*

[***178] [**978] "There is perhaps no area of news more inaccurately reported factually, on the whole, though with some notable exceptions, than legal news.

[*480] "Some part of this is due to carelessness.... But a great deal of it must be attributed, in candor, to ignorance which frequently is not at all blameworthy. For newspapers are conducted by men who are laymen to the law. With too rare exceptions their capacity for misunderstanding the significance of legal events and procedures, not to speak of opinions, is great. But this is neither remarkable nor peculiar to newsmen. For the law, as lawyers best know, is full of perplexities.

"In view of these facts any standard which would require strict accuracy in reporting legal events factually or in commenting upon them in the press would be an impossible one. Unless the courts and judges are to be put above criticism, no such rule [*481] can obtain. There must be some room for misstatement of fact, as well as for misjudgment, if the press and others are to function as critical agencies in our democracy concerning courts as for all other instruments of government." *Pennekamp v. Florida, 328 U.S. 331, 371-372 (1946)* (Rutledge, J., concurring). [10]

10 Judge Frank's opinion of the phenomenon and its cause appears to have been roughly comparable. J. Frank, Courts On Trial 1-3 (Atheneum ed. 1963).

For precisely such reasons, we have held that the contempt power may not be used to punish the reporting of judicial proceedings merely because a reporter "missed the essential point in a trial or failed to summarize the issues to accord with the views of the judge who sat on the case." *Craig v. Harney, 331 U.S., at 375.* See also *Pennekamp v. Florida, supra.* And "[w]hat a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel." *New York Times, 376 U.S., at 277.* The *First Amendment* insulates from defamation liability a margin for error sufficient to ensure the avoidance of crippling press self-censorship in the field of reporting public judicial affairs. To be adequate, that margin must be both of sufficient breadth and predictable in its application. In my view, therefore, the actual-malice standard of New York Times must be met in order to justify the imposition of liability in these circumstances.

MR. JUSTICE WHITE, dissenting

[***179] I would affirm the judgment of the

Florida Supreme Court because *First Amendment* values will not be furthered in any way by application to this case of the fault standards newly drafted and imposed by *Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)*, upon which my [*482] Brother REHNQUIST relies, or the fault standards required by *Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971)*, upon which my Brother BRENNAN relies; and because, in any event, any requisite fault was properly found below.

The jury found on ample evidence that the article published by petitioner Time, Inc., about respondent Firestone was false and defamatory. This Court has held, and no one seriously disputes, that, regardless of fault, "there is no constitutional value in false statements of fact." "They belong to that category of utterances which '... are of such slight social value as'" to be worthy of no *First Amendment* protection. *Gertz v. Robert Welch, Inc., supra, at 340*, quoting *Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)*. This Court's decisions from *New York Times Co. v. Sullivan, 376 U.S. 254 (1964)*, through *Gertz v. Robert Welch, Inc., supra*, holding that the Constitution requires a finding of some degree of fault as a precondition to a defamation award, have done so for one reason and one reason alone: unless [**979] innocent falsehood is allowed as a defense, some true speech will also be deterred. Thus "[t]he *First Amendment* requires that we protect some falsehood in order to protect speech that matters," *Gertz v. Robert Welch, Inc., supra, at 341* (emphasis supplied), e.g., true fact statements. In light of these decisions, the threshold question in the instant case should be whether requiring proof of fault on the part of Time, Inc., as a precondition to recovery in this case -- and thereby possibly interfering with the State's desire to compensate respondent Firestone -- will contribute in any way to the goal of protecting "speech that matters." I think it would not.

At the time of the defamatory publication in this case -- December 1967 -- the law clearly authorized liability [*483] without fault in defamation cases of the sort involved here. * Whatever the chilling effect of that rule of law on publication of "speech that matters" in 1967 might have been, it has already occurred and is now irremediable. The goal of protecting "speech that matters" by announcing rules, as this Court did in [***180] *Gertz v. Robert Welch, Inc., supra*, and *Rosenbloom v. Metromedia, Inc., supra*, requiring fault as a precondition to a defamation recovery under circumstances such as are involved here, is fully achieved so long as fault is required for cases in which the publication occurred after the dates of those decisions. This is not such a case.

> * *Konigsberg v. State Bar of California, 366 U.S. 36, 49, and n. 10 (1961)*; *Times Film Corp. v. Chicago, 365 U.S. 43, 48 (1961)*; *Roth v. United States, 354 U.S. 476, 486-487 (1957)*; *Beauharnais v. Illinois, 343 U.S. 250, 266 (1952)*; *Pennekamp v. Florida, 328 U.S. 331, 348-349 (1946)*; *Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)*; *Near v. Minnesota ex rel. Olson, 283 U.S. 697, 715 (1931)*. The majority concludes that respondent Firestone was neither a "public official" nor a "public figure," *New York Times Co. v. Sullivan, 376 U.S. 254 (1964)*; *Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967)*, and therefore that this case does not fall within any exception, then announced, to the Court's statements that common-law defamation rules do not violate the *First Amendment*. In this respect I agree with the majority.

Therefore, to require proof of fault in this case -- or in any other case predating Gertz and Rosenbloom in which a private figure is defamed -- is to interfere with the State's otherwise legitimate policy of compen sating defamation victims without furthering *First Amendment* goals in any way at all. In other areas in which the Court has developed a rule designed not to achieve justice in the case before it but designed to induce socially desirable conduct by some group in the future, the Court has declined to apply the rule to fact situations predating its announcement, e.g., *Williams v.* [*484] *United States, 401 U.S. 646, 653 (1971)* (plurality opinion). The Court should follow a similar path here.

In any event, the judgment of the court below should be affirmed. My Brother REHNQUIST concludes that negligence is sufficient fault, under Gertz, to justify the judgment below, and that a finding of negligence may constitutionally be supplied by the Florida Supreme Court. I agree. Furthermore, the state court referred to Gertz v. Robert Welch, Inc., by name; noted the "convincing evidence of... negligence" in the case; pointed out that a careful examination of the divorce decree would have "clearly demonstrated" that the divorce was not grounded on adultery, as reported by Time, Inc.; and stated flatly: "This is a flagrant example of 'journalistic negligence.'" *305 So. 2d 172, 178 (1974)*.

It appears to me that the Florida Supreme Court has made a sufficiently "conscious determination," ante, at 463, of the fact of negligence. If it is Gertz that controls this case and if that decision is to be applied retroactively, I would affirm the judgment.

[**980] MR. JUSTICE MARSHALL, dissenting.

The Court agrees with the Supreme Court of Florida that the "actual malice" standard of *New York Times Co. v. Sullivan, 376 U.S. 254 (1964)*, does not apply to this case. Because I consider the respondent, Mary Alice Firestone, to be a "public figure" within the meaning of our prior decisions, *Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)*; *Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967)*, I respectfully dissent.

I

Mary Alice Firestone was not a person "first brought to public attention by the defamation that is the subject of the lawsuit." *Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 78, 86 (1971)* (MARSHALL, J., dissenting). On the contrary, she was "prominent among the '400' of [*485] Palm Beach society," and an "active [member] of the sporting set," *271 So. 2d 745, 751 (Fla. 1972)*, whose activities predictably attracted the attention of a sizable portion of the public. Indeed, Mrs. Firestone's appearances in the press were evidently frequent enough to warrant [***181] her subscribing to a press-clipping service.

Mrs. Firestone brought suit for separate maintenance, with reason to know of the likely public interest in the proceedings. As the Supreme Court of Florida noted, Mr. and Mrs. Firestone's "marital difficulties were... well-known," and the lawsuit became "a veritable cause celebre in social circles across the country." Ibid. The 17-month trial and related events attracted national news coverage, and elicited no fewer than 43 articles in the Miami Herald and 45 articles in the Palm Beach Post and Palm Beach Times. Far from shunning the publicity, Mrs. Firestone held several press conferences in the course of the proceedings.

These facts are sufficient to warrant the conclusion that Mary Alice Firestone was a "public figure" for purposes of reports on the judicial proceedings she initiated. In *Gertz v. Robert Welch, Inc., supra, at 352*, we noted that an individual can be a public figure for some purposes and a private figure for others. And we found two distinguishing features between public figures and private figures. First, we recognized that public figures have less need for judicial protection because of their greater ability to resort to self-help: "public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy." *418 U.S., at 344.*

As the above recital of the facts makes clear, Mrs. Firestone is hardly in a position to suggest that she lacked access to the media for purposes relating to her lawsuit. [*486] It may well be that she would have had greater difficulty countering alleged falsehoods in the national press than in the Miami and Palm Beach papers that covered the proceedings so thoroughly. But presumably the audience Mrs. Firestone would have been most interested in reaching could have been reached through the local media. In any event, difficulty in reaching all those who may have read the alleged falsehood surely ought not preclude a finding that Mrs. Firestone was a public figure under Gertz. Gertz set no absolute requirement that an individual be able fully to counter falsehoods through self-help in order to be a public figure. We viewed the availability of the self-help remedy as a relative matter in Gertz, and set it forth as a minor consideration in determining whether an individual is a public figure.

The second, "more important," consideration in Gertz was a normative notion that public figures are less deserving of protection than private figures: That although "it may be possible for someone to become a public figure through no purposeful action of his own," generally those classed as public figures have "thrust themselves to the forefront of particular public controversies" [**981] and thereby "[invited] attention and comment." *Id., at 344-345.* And even if they have not, "the communications media are entitled to act on the assumption that... public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them. " *Id., at 345.*

[***182] We must assume that it was by choice that Mrs. Firestone became an active member of the "sporting set" -- a social group with "especial prominence in the affairs of society," ibid., whose lives receive constant media attention. Certainly there is nothing in the record to indicate otherwise, and Mrs. Firestone's subscription to a press-clipping service suggests that she was not

altogether uninterested [*487] in the publicity she received. Having placed herself in a position in which her activities were of interest to a significant segment of the public, Mrs. Firestone chose to initiate a lawsuit for separate maintenance, and most significantly, held several press conferences in the course of that lawsuit. If these actions for some reason fail to establish as a certainty that Mrs. Firestone "voluntarily exposed [herself] to increased risk of injury from defamatory falsehood," surely they are sufficient to entitle the press to act on the assumption that she did. Accordingly, Mrs. Firestone would appear to be a public figure under Gertz.

The Court resists this result by concluding that the subject matter of the alleged defamation was not a "public controversy" as that term was used in Gertz. In part, the Court's conclusion rests on what I view as an understatement of the degree to which Mrs. Firestone can be said to have voluntarily acted in a manner that invited public attention. But more fundamentally its conclusion rests on a reading of Gertz that differs from mine. The meaning that the Court attributes to the term "public controversy" used in Gertz resurrects the precise difficulties that I thought Gertz was designed to avoid.

It is not enough for the Court that, because of Mrs. Firestone's acquired prominence within a segment of society, her lawsuit had already attracted significant public attention and comment when the Time report was published. According to the Court, the controversy, already of interest to the public, was "not the sort of 'public controversy' referred to in Gertz." Ante, at 454. The only explanation I can discern from the Court's opinion is that the controversy was not of the sort deemed relevant to the "affairs of society," ante, at 453, and the public's interest not of the sort deemed "legitimate" or worthy of judicial recognition.

[*488] If there is one thing that is clear from Gertz, it is that we explicitly rejected the position of the plurality in *Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971)*, that the applicability of the New York Times standard depends upon whether the subject matter of a report is a matter of "public or general concern." We explained in Gertz that the test advanced by the Rosenbloom plurality S%"would occasion the... difficulty of forcing state and federal judges to decide on an ad hoc basis which publications address issues of 'general or public interest' and which do not -- to determine, in the words of MR. JUSTICE MARSHALL, 'what information is relevant to self-government.' *Rosenbloom v. Metromedia, Inc., 403 U.S., at 79*. We doubt the wisdom of committing this task to the conscience of judges." *418 U.S., at 346*.

[***183] Having thus rejected the appropriateness of judicial inquiry into "the legitimacy of interest in a particular event or subject," *Rosenbloom, supra, at 78, 79* (MARSHALL, J., dissenting), Gertz obviously did not intend to sanction any such inquiry by its use of the term "public controversy." Yet that is precisely how I understand the Court's opinion to interpret Gertz. [1]

1 The Supreme Court of Florida's explanation of why the New York Times standard is inapplicable is equally inconsistent with Gertz. After referring to Mrs. Firestone's prominence in Palm Beach society, the widespread attention her lawsuit received, and her granting of interviews to the news media, the court reasoned as follows:

"That the public was curious, titillated or intrigued with the scandal in the Firestone divorce is beyond doubt. But we again emphasize the distinction we make between that genre of public interest and real public or general concern.

. . . . .

"... [We] cannot find here any aspect of real public concern, and none has been shown to us, which would be furthered or enhanced by 'free discussion' and 'robust debate' about the divorce of Russell and Mary Alice Firestone.

"Nor did [Mrs. Firestone's] quoted interviews with the press raise the untidy affair to the dignity of true public concern. Unlike an actress who might grant interviews relating to the opening of her new play, [Mrs. Firestone] was not seeking public patronage. Publicity, or sympathy, perhaps, but not patronage. Irrespective of her subjective motives, objectively she was merely satiating the appetites of a curious press.

"In sum, the Firestone divorce action was unquestionably newsworthy, but reports thereof were not constitutionally protected as being matters of real public or general concern." *271 So. 2d, at 752*.

This language is from an opinion that issued before Gertz was decided, but the reasoning was reaffirmed in the Supreme Court of Florida's final opinion in the case, *305 So. 2d 172, 174-175 (1974)*, which issued after our decision in Gertz.

[*489] [**982] If Gertz is to have any meaning at all, the focus of analysis must be on the actions of the individual, and the degree of public attention that had already developed, or that could have been anticipated, before the report in question. Under this approach, the class of public figures must include an individual like Mrs. Firestone, who acquired a social prominence that could be expected to attract public attention, initiated a lawsuit that predictably attracted more public attention, and held press conferences in the course of and in regard to the lawsuit. [2] I would hold that, for purposes of this [*490] case, Mrs. Firestone is a public figure, who must demonstrate that the report in question was published with "actual malice" -- that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

2 The Court places heavy emphasis on the degree to which Mrs. Firestone attempted to "influence the resolution of" a particular controversy. In response to the observation that Mrs. Firestone held press conferences, for example, the Court notes that those conferences were not intended to influence the outcome of the trial or any other controversy.Ante, at 454-455, n. 3. Gertz did, of course, refer to the fact that persons often become public figures by attempting to influence the resolution of public questions. *418 U.S., at 345*. But the reference must be viewed as but an example of how one becomes a public figure. Surely Gertz did not intend to establish a requirement that an individual attempt to influence the resolution of a particular controversy before he can be termed a public figure. If that were the rule, Athletic Director Butts in *Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967)*, would not be a public figure. We held that Butts was a public figure, and in Gertz we specifically noted that that decision was "correct." *418 U.S., at 343*.

II

[***184] While the foregoing discussion is sufficient to dispose of the case under my reading of the law, two other aspects of the Court's opinion warrant comment. First, the Court appears to reject the contention that a rational interpretation of an ambiguous document is always entitled to some constitutional protection. The Court reads *Time, Inc. v. Pape, 401 U.S. 279 (1971)*, as providing such protection only under the rubric of the New York Times "actual malice" standard. Ante, at 459 n. 4. I disagree. While the precise holding in Pape was that the choice of one of several rational interpretations of an ambiguous document is not enough to create a jury issue of "actual malice," the Court's reasoning suggests that its holding ought not be so confined. In introducing its discussion, the Court noted:

"[A] vast amount of what is published in the daily and periodical press purports to be descriptive of what somebody said rather than of what anybody did. Indeed, perhaps the largest share of news concerning the doings of government appears in the form of accounts of reports, [**983] speeches, press conferences, and the like. The question of the 'truth' of [*491] such an indirect newspaper report presents rather complicated problems." *401 U.S., at 285-286* (emphasis in original).

And in discussing the need for some protection for the publisher attempting to report the gist of a lengthy government document, the Court observed:

"Where the document reported on is so ambiguous as this one was, it is hard to imagine a test of 'truth' that would not put the publisher virtually at the mercy of the unguided discretion of a jury." *Id., at 291*.

Surely the Court's evident concern that publishers be accorded the leeway to offer rational interpretations of ambiguous documents was not restricted to cases in which the New York Times standard is applicable. That concern requires that protection for rational interpretations be accorded under the fault standard contemplated in Gertz. Thus my Brothers POWELL and STEWART, while joining the opinion of the Court, recognize that the rationality of an interpretation of an ambiguous document must figure as a crucial element in any assessment of fault under Gertz. Ante, at 467-469.I agree. The choice of one of several rational interpretations of an ambiguous document, without more, is insufficient to support a finding of fault under Gertz.

Finally, assuming that the Court is correct in its assessment of the law in this case, I find the Court's

disposition baffling. The Court quotes that portion of the Florida Supreme Court's opinion which, citing Gertz, states in no uncertain terms that Time's report was a "flagrant example of 'journalistic negligence.'" *305 So. 2d 172, 178 (1974)*. But the Court is unwilling to read that statement as a "conscious determination" of fault, and accordingly the Court remands the case for an assessment of fault.

[*492] Surely the Court cannot be suggesting [***185] that the quoted portion of the Supreme Court of Florida's opinion, which contained a citation to Gertz, had no meaning at all. And if it did have meaning, it must have reflected either an intention to find fault or an intention to affirm a finding of fault. It is quite clear that the opinion was not intended to affirm any finding of fault, for as the Court observes there was no finding of fault to affirm. The question of fault had not been submitted to the jury, and the District Court of Appeal had explicitly noted the absence of any proof that Time had been negligent. *254 So. 2d 386, 390 (1971)*. The absence of any prior finding of fault only reinforces what the Florida Supreme Court's language itself makes clear -- that the court was not simply affirming a finding of fault, but making such a finding in the first instance.

I therefore agree with my Brother WHITE that the Supreme Court of Florida made a conscious determination of fault. I would add, however, that it is a determination that is wholly unsupportable. The sole basis for that court's determination of fault was that under Florida law a wife found guilty of adultery cannot be, as Mrs. Firestone was, awarded alimony. Time, the court reasoned, should have realized that a divorce decree containing an award of alimony could not, consistent with Florida law, have been based on adultery. But that reasoning assumes that judicial decisions can always be squared with the prior state of the law. If we need be reminded that courts occasionally err in their assessment of the law, we need only refer to the subsequent history of the divorce decree involved in this case: When the divorce case reached the Supreme Court of Florida, that court found that the divorce had been granted for lack of "domestication" and pointed out that that was not one of the statutory grounds for [*493] divorce. *Firestone v. Firestone, 263 So. 2d 223 (1972)*. Time's responsibility was to report accurately what the trial court did, not what it could or should [**984] have done. If the trial court awarded alimony while basing the divorce on a finding of adultery by the wife, Time cannot be faulted for reporting that fact. Unless there is some basis for a finding of fault other than that given by the Supreme Court of Florida, I think it clear that there can be no liability.

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